Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

SHARON HOFFMAN, TRUDIE MATTHEWS, DIANE HOEFLING, REVEREND RONNIE WALLACE, AND REVEREND JOHN BRADLEY,

Petitioners,

-v-

JAMES B. HUNT, JR., Governor of the State of North Carolina, STATE OF NORTH CAROLINA, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are individuals who have engaged in undisputedly peaceful and lawful sidewalk counseling, picketing, and other speech outside abortion businesses in Charlotte, North Carolina. Having encountered repeated threats of arrest under a state statute, N.C.G.S. § 14-277.4, and the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248, petitioners sued in federal court challenging the constitutionality of both N.C.G.S. § 14-277.4 and FACE, both on their face and as applied.

1. Where, under the undisputed factual record and findings of the district court, police have repeatedly threatened to arrest petitioners under a state statute, for engaging in admittedly constitutionally protected activities, did the court of appeals err by reversing judgment in favor of defendants on the bizarre grounds that the threats of arrest were not only unconstitutional but also illegal?

2. Is N.C.G.S. § 14-277.4 unconstitutional as applied?

3. Did the court of appeals err by expanding Congressional power far beyond any precedents of this Court by holding that the Commerce Clause gives Congress the power to prohibit noneconomic, intrastate activity, even in the absence of a jurisdictional requirement?

4. Does FACE exceed the constitutional powers of Congress under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3?

5. Does FACE unconstitutionally discriminate against opponents of abortion in violation of the First and Fifth Amendments, U.S. Const. amends. I, V?

6. Does FACE violate the free speech and assembly guarantees of the First Amendment, U.S. Const. amend. I?

PARTIES

The names of all the parties to the proceedings in the court below appear in the caption of this case.*

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*None of the petitioners is a corporation. See Rule 29.6.

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DECISIONS BELOW

The decision of the court of appeals is reported as *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997) (App. A). The final decision of the district court is reported as *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996) (App. B). An earlier decision of the district court is reported as *Hoffman v. Hunt*, 845 F. Supp. 340 (W.D.N.C. 1994) (App. C).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment in this case on September 19, 1997. Petitioners filed a timely petition for rehearing with suggestion for rehearing in banc, which was denied on November 14, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the Commerce Clause of, and the First, Fifth, Tenth, and Fourteenth Amendments to, the U.S. Constitution, are set forth in Appendix L. The text of the challenged North Carolina statute, N.C.G.S. § 14-277.4, is set forth in Appendix M. The text of the Freedom of Access to Clinic Entrances (FACE) statute, 18 U.S.C. § 248, is set forth in Appendix N.

STATEMENT OF THE CASE

This is a federal civil rights action under 42 U.S.C. § 1983. Petitioners, peaceful sidewalk counselors and demonstrators, were threatened with arrest under both the North Carolina "access" statute, N.C.G.S. § 14-277.4, and the federal Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248. Petitioners therefore challenged the constitutionality of § 14-277.4 and FACE, on their face and as applied,[1] and requested declaratory and injunctive relief.

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[1]The district court did not reach the question whether FACE

Facts

Petitioners -- plaintiffs below -- are citizens who object to abortion as the destruction of innocent human life. Petitioners and others have engaged in peaceful and lawful leafletting, picketing, sidewalk counseling, and other expressive activities in the vicinity of abortion businesses in Charlotte, North Carolina. Petitioners seek by their expressive activities to persuade mothers considering abortion to keep their babies and physicians to stop doing abortions.

The State of North Carolina enacted a statute, N.C.G.S. § 14-277.4 ("Obstruction of health care facilities"), which became effective on October 1, 1993. That statute provides that:

> No person shall obstruct or block another person's access to or egress from a health care facility . . . in a manner that deprives or delays the person from obtaining or providing health care services in the facility.

§ 14-277.4(a). The statute also provides:

> This section shall not prohibit any person from engaging in lawful speech or picketing which does not impede or deny another person's access to health care services or to a health care facility or interfere with the delivery of health care services within a health care facility.

§ 14-277.4(e). Violation of the statute is a criminal offense, §

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was unconstitutional as applied. Instead, the court invalidated FACE on its face, rendering the as applied challenge moot. Hence, there has not yet been any factual hearing or decision on that issue. Accordingly, the constitutionality of FACE "as applied" is not before this Court.

14-277.4(c). In addition, the statute authorizes civil injunctive relief by "[a]ny person aggrieved under this section," § 14-277.4(d).

After § 14-277.4 became effective, police in Charlotte began threatening petitioners and others with arrest under the state statute. The undisputed record and the findings of the district court show that petitioners and others faced threats of arrest for doing no more than engaging in peaceful, constitutionally protected expressive activities:

> All of the witnesses testified that they had never engaged in violence or threats of violence to achieve the goals of delaying a person from having an abortion or changing the mind of someone seeking an abortion . . . .
>
> All of the witnesses testified that they had experienced difficulty in having the police define exactly what was and was not a violation of the statute. Likewise, all of the witnesses recounted examples where the personnel of clinics providing abortions had goaded the police into changing their interpretation of the statute. . . . For example, Ms. Graham testified:
>
> > A. Well, there are occasions when police officers say that handing out that literature is in violation of the statute. There was even one occasion when a woman police officer came to the scene, and she talked to the abortion clinic administrator, then came and talked to me and said that there were people who were coming into the clinic for other reasons than abortions, and they were there to have abortions, which is perfectly legal, and that just our presence there was causing them to call in and say that they were going to delay their appointments, and, therefore, that was in violation of the statute and she had every right to arrest me just for that.
>
> . . . Police officers told Karen Graham that if a car stops

to receive literature then they would be delayed and that would be in violation of the statute. . . . Police drew imaginary lines on the public sidewalk and told Graham that she would have to stand behind the line and could not cross it to hand literature to a car which had stopped in the driveway crossing the sidewalk to get the literature to the car. . . .

On June 11, 1994, after the Clinic Administrator complained to the police that the demonstrators should have been arrested because they had violated the statute, the police stopped three of them, took their telephone numbers and where they worked and told them a warrant may be issued for their arrest. . . . All of the witnesses testified that as a result of this threat they spent the ensuing weeks in constant fear of arrest and repeatedly called the Police Department to try and learn if they were going to be prosecuted. When Ms. Graham called the Police Department to find out if she would be prosecuted, she was told that the police were still trying to decide if the protestors had violated the statute. . . .

On the following Saturday, a police officer told the protestors that if they violated the statute he would have them arrested. When Graham asked what his interpretation of the statute was so that she would know how not to violate it, the officer responded that she would know when he arrested her. When she told the officer that every officer who came out told her something different and asked him to tell her what she could do not to be arrested, he said "you can stay home." . . .

There were occasions when clinic "escorts" physically blocked Ms. Graham on public property from handing out leaflets to persons who indicated they wanted to receive them. . . . Ms. Graham testified that every time she went out to an abortion clinic she was threatened with arrest and was told most of the time she couldn't hand out her literature and couldn't persuade people

not to have an abortion. . . .

. . . . .

The Reverend Ronnie Wallace testified that . . . the enforcement of the statute depends upon the content of the message he preaches outside of the clinics and the degree to which clinic personnel goad the police. He testified that when he preaches against abortion in general moral terms clinic personnel don't really object and there is no real problem. But when he speaks out about the racist and genocidal motives behind abortion or the malpractice record of the doctor performing the abortions, clinic personnel "go ballistic" and call the police. On several occasions police told Wallace that he could not preach on the sidewalk, but instead, he had to keep moving. Wallace was forced to keep parading back and forth of the clinic with one police officer in front of him and one police officer behind him. . . . The police told Wallace that by preaching he was interfering with people driving into the clinic and that kneeling to pray on the grassy knoll between the street and the sidewalk was "escalating the situation." . . .

The witnesses testified to a real fear of arrest. One Sgt. Whitt Neal of the Charlotte Police Department on one occasion told the police officers that he had enough handcuffs for all of them and to line them up and he would arrest them. . . . Graham testified as to the effect this had on the group as follows:

> A: Well, the group that remained there, we thought for sure that we were going to be arrested, and at that time, I started pleading with Sergeant Neal. I said, "Please don't arrest us, we didn't come here to get arrested." He said, "You came here to test the law, and that's what we're going to do here, you pick the ones you want arrested, I'll just get you arrested." And I said, "No, sir, we don't want to be arrested, we came out here just to distribute our

> literature, please let us clear this up, let me call the captain on Monday morning, please don't arrest us." And he finally had conversation with some of the other officers and decided not to arrest us but just take the names of the three of us.
>
> . . .
>
> There is no evidence that any of the protestors, including the Plaintiffs, in any way engaged in anything more than speech which did not involve threats, force, obstruction, or physical impediment. Rather, the evidence reveals mere leafletting to impede and interfere with abortion through peaceful persuasion. . . .

App. 37a-40a (citations to record omitted).

On May 26, 1994, President Clinton signed into law the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248. Petitioners then began facing threats of arrest under that statute as well.

Course of Proceedings

Petitioners filed suit in the United States District Court for the Western District of North Carolina on December 6, 1993. In their complaint, petitioners challenged the state "access" statute, N.C.G.S. § 14-277.4, on its face and as applied. Petitioners named as defendants the respondents James B. Hunt, Governor of North Carolina, and the State of North Carolina. Petitioners also sued the Charlotte-Mecklenburg Police Department and D.R. Stone, the Chief of Police for the Urban Unit of the Charlotte-Mecklenburg Police Department. Petitioners sought injunctive and declaratory relief. Simultaneously with the filing of the complaint, petitioners moved for a temporary restraining order (TRO) and a preliminary injunction.

All of the defendants moved to dismiss or, in the alternative, for abstention. After hearing oral argument on

the motions, the district court denied the motions to dismiss (except as to the police department), denied the motions to abstain, and denied a TRO and a preliminary injunction, Hoffman v. Hunt, 845 F. Supp. 340, 352-53 (W.D.N.C. 1994) (App. C). The district court dismissed the police department on the grounds that the department was not a suable entity under § 1983. 845 F. Supp. at 344 n.1 (App. 98a n.1).[2]

After the federal FACE law went into effect and petitioners began encountering threats under that statute as well, petitioners amended their complaint to challenge FACE both facially and as applied. The clerk of court subsequently gave notice to the Attorney General of the United States of the challenge to FACE, and the Attorney General intervened on behalf of the respondent United States in defense of FACE.

The district court ordered a stay of proceedings relating to FACE pending the appeal, in the Fourth Circuit, of another challenge to FACE, American Life League v. Reno (ALL). The Fourth Circuit thereafter issued a decision upholding FACE. American Life League v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 516 U.S. 809 (1995).

The decision of the Fourth Circuit in ALL issued on February 13, 1995. The respondents Gov. Hunt and State of North Carolina promptly moved for dismissal (as to FACE) and summary judgment (as to N.C.G.S. § 14-277.4). Petitioners opposed the motion.

On April 26, 1995, the Supreme Court released its opinion in United States v. Lopez, 514 U.S. 549 (1995). In Lopez, this Court addressed the proper test for reviewing exercises of Congressional power under the Commerce Clause and, applying that test, struck down a federal anti-gun statute.

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[2]On March 17, 1994, petitioners voluntarily dismissed Chief of Police D. R. Stone from the case under Rule 41, Fed. R. Civ. P.

On October 17, 1995, the district court vacated its order staying proceedings related to FACE and ordered the parties to brief the impact of Lopez on the constitutionality of FACE. Petitioners and respondent United States thereafter filed briefs addressing the authority of Congress to enact FACE under the Commerce Clause. Respondent United States also moved to dismiss the challenge to FACE. Petitioners, who had a pending motion for preliminary injunction against FACE, cross-moved for judgment on the pleadings.

Meanwhile, the district court scheduled an evidentiary hearing regarding the "as applied" challenge to N.C.G.S. § 14-277.4. The state put on no evidence and did not dispute petitioners' factual case. Rather, the state argued that because no petitioner had actually been arrested, no petitioner could challenge the statute.

The district court issued a decision and final judgment on April 1, 1996. On April 17, 1996, the district court issued an amended decision and judgment correcting certain formal matters. App. B.

The district court held the state statute, N.C.G.S. § 14-277.4, unconstitutional both on its face and as applied. With regard to the facial challenge, the court held the statute to be unconstitutionally vague and overbroad. App. 50a-57a.

Regarding the "as applied" challenge to § 14-277.4, the district court had "no doubt that the statute has been enforced -- at least in Charlotte, North Carolina -- in an arbitrary way that has violated the First Amendment rights of the Plaintiffs and chilled those rights." App 52a. The court found this conclusion "confirmed in disturbing detail by the unrebutted evidence in this case." Id. at 46a.

The district court also held FACE unconstitutional on its face. (The court did not reach petitioners "as applied" challenge to FACE.) The court ruled that the Lopez decision controlled the Commerce Clause issue and superseded the

Fourth Circuit's pre-Lopez ruling in ALL v. Reno. App. 56a n.5. Applying the Lopez standard, the district court observed that whether abortion businesses themselves substantially affected interstate commerce was not the issue. "FACE is not aimed at the commercial activity of abortion clinics." App. 61a. Rather, "the regulatory target of FACE is . . . protest activity . . ., not the abortion clinics." Id. at 58a. Hence FACE could not be justified as a "regulation of activities arising out of, or connected with, a commercial transaction which, when viewed in the aggregate, substantially affect interstate commerce." Id. at 70a (citing Lopez). Nor, the court noted, does FACE have a jurisdictional element which would limit its application on a case-by-case basis to activities substantially affecting interstate commerce. App. 70a. The court went on to hold that the rationales profferred in support of FACE possessed no logical stopping points and would therefore equally justify a general federal police power. Id. at 57a (noting that many crimes are "national in scope" and affect interstate commerce "to some minimal degree"), 75a (a limitless theory of causation would provide the basis of "a federal police power"), 77a (if the findings of Congress made in support of FACE are sufficient, then Congress "can regulate any activity . . . so long as it bothers to make any findings of record at all"). Hence, under Lopez, FACE exceeded the constitutional limits on federal power.[3]

The district court also held FACE unconstitutional under the First Amendment. The court observed that FACE is flagrantly discriminatory -- it punishes certain pro-life activities while exempting identical conduct engaged in by, for example, environmental protesters. App. 88a-89a (citing Senate Report). Even under deferential scrutiny, the court held that FACE was unconstitutionally content-based and

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[3]The district court also observed that because the Fourteenth Amendment limits state action, Section Five of that Amendment could not justify FACE's restrictions on private actors like petitioners. App. 83a-85a.

overbroad.[4] App. 89a-90a.

In conclusion, the district court declared N.C.G.S. § 14-277.4 and FACE unconstitutional and permanently enjoined their enforcement.[5]

The state and federal defendants -- respondents here -- appealed to the Fourth Circuit. That court reversed the district court's judgment. App. A.

With regard to the state statute, § 14-277.4, the Fourth Circuit construed the statute to forbid only "physical impediments" to access, not peaceful protest or persuasion. App. 11a. Furthermore, the court of appeals held that § 14-277.4(e) -- exempting speech "which does not impede or deny . . . access" -- was simply a savings clause which prohibited nothing and hence did "not criminalize constitutionally protected speech." App. 11a-12a. Accordingly, § 14-277.4 was neither vague nor overbroad on its face. App. 10a-12a.

The court of appeals purported not to reach the unconstitutionality of § 14-277.4 "as applied," App. 9a, but nevertheless reversed the district court, App. 27a. The Fourth Circuit agreed "that the uncontroverted evidence shows that law enforcement officers have threatened Plaintiffs with arrest under the statute for engaging in constitutionally protected activities." Id. at 12a. The court also noted that the state did "not dispute that the statute has been enforced in an unconstitutional manner." Id. Moreover, the court rejected the state's only argument -- that because petitioners were not actually arrested under § 14-277.4, they lacked standing

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[4]The district court rejected other free speech arguments on the basis that the Fourth Circuit's decision in ALL v. Reno precluded those arguments. App. 86a-87a.

[5]The district court subsequently declined to stay its order pending appeal. App. I. The Fourth Circuit, however, then issued a stay pending appeal. App. J.

to challenge that statute. App. 12a ("It is well settled that a genuine threat of enforcement is sufficient to confer standing"). Nevertheless, the court did not formally decide the constitutional question. Instead, the court found an "alternative, nonconstitutional basis" for its decision, id. at 13a: in light of the court's earlier holding that § 14-277.4 did not reach protected speech, the court ruled that "law enforcement officers exceeded their authority in threatening Plaintiffs with arrest" for peaceful protest activity. App. 13a. The court of appeals did not explain why this "alternative" theory -- that the threatened enforcement of § 14-277.4 was illegal as well as unconstitutional -- required reversal rather than affirmance on alternative grounds. The court also failed to explain how it could reverse the court below on a ground neither raised nor argued by the state appellants.

Turning to FACE, the Fourth Circuit held that its prior decision in ALL v. Reno was not "untenable" in light of Lopez and hence, whether correct or not, ALL was binding upon the present three-judge panel. App. 16a. Accordingly, the Fourth Circuit rejected petitioners' Commerce Clause argument on the grounds that it was bound to follow the prior circuit precedent of ALL v. Reno. App. 25a.

With regard to petitioners' First Amendment challenge to FACE, the Fourth Circuit agreed that ALL v. Reno did not foreclose all arguments. Nevertheless, the court summarily rejected petitioners' new free speech arguments. App. 25a-26a.

Petitioners timely sought rehearing and rehearing in banc, which the Fourth Circuit denied. App. K.

REASONS FOR GRANTING THE WRIT

In recent years, this Court has reviewed cases presenting unrepresentative and negative factual portrayals of pro-life activism. Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994); Schenck v. Pro-Choice Network of Western New York, 117 S. Ct. 855 (1997). The present case features the

much more typical scenario: peaceful, law-abiding picketers and sidewalk counselors facing continuing harassment from police and agents of the abortion facility. See App. 12a; id. at 32a-43a. Cf. Cannon v. City and County of Denver, 998 F.2d 867, 869, 877-78 (10th Cir. 1993) (police harassment of law-abiding pro-life demonstrators).

The court of appeals left petitioners without relief under 42 U.S.C. § 1983 despite undisputed and overwhelming evidence that petitioners faced repeated, blatantly unconstitutional threats of enforcement of a state statute, N.C.G.S. § 14-277.4. In effect, the court below has per se abolished "as applied" challenges to statutes.

With regard to FACE, the court below has upheld the statute under a theory that would authorize limitless federal police power and render this Court's Lopez decision a meaningless, fact-bound aberration. Indeed, the Fourth Circuit clearly views Lopez as an anomaly without precedential value. Brzonkala v. Virginia Polytechnic Institute, ____ F.3d ____, ____ n.13 (4th Cir. Dec. 23, 1997) (1997 WL 785529 at *21 n.13) ("it is unsurprising that courts have resisted urgings to extend Lopez beyond § 922(q) [the Gun Free School Zones Act]") (internal quotation marks and citations omitted), reh'g granted, No. 96-1814 (4th Cir. Feb. 5, 1998) (in banc).

I. THIS COURT SHOULD REVIEW PETITIONERS' CHALLENGE TO N.C.G.S. § 14-277.4.

The court below has substantially obliterated the distinction between "facial" and "as applied" challenges to state statutes.

Petitioners challenged § 14-277.4 both on its face and as applied. The court of appeals rejected the facial challenge and, while purporting not to reach the "as applied" challenge, nevertheless reversed on that issue as well. In the process, the court of appeals essentially eliminated per se an entire

category of "as applied" challenges. This Court should grant review and reverse this pernicious holding.

This Court has held that when "a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute," a federal lawsuit is proper "whether an attack is made on the constitutionality of the statute on its face or as applied." Steffel v. Thompson, 415 U.S. 452, 475 (1974) (footnote omitted). The "facial" and "as applied" challenges are distinct. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992) (restriction on free speech "may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable"); Steffel, 415 U.S. at 474 (contrasting facial invalidation of statute in toto with "a declaration specifying a limited number of impermissible applications of the statute").

In the case at bar, there is simply no dispute that the challenged state statute, N.C.G.S. § 14-277.4, has been applied in a flagrantly unconstitutional manner. Petitioners presented uncontested evidence that demonstrated "in disturbing detail" the repeated threats of arrest petitioners faced under the statute for the exercise of their free speech rights outside abortion businesses. App. 46a. The state did not disagree, but instead argued, contrary to Steffel, that threats of arrest did not confer standing. The Fourth Circuit properly rejected that argument. App. 12a.

The court of appeals nevertheless declined to sustain petitioners' "as applied" challenge. The court reasoned that, because the state statute was constitutional on its face, it did not authorize the unconstitutional applications petitioners encountered. Id. at 13a. The court concluded that it therefore "need not reach" petitioners' "as applied" challenge. Id.

This ruling is absurd. By holding the threats of arrest to be illegal as well as unconstitutional, the court simply found an additional reason to grant petitioners relief on their "as

applied" challenge. To deny relief against the threatened arrests because those arrests were illegal is Alice in Wonderland jurisprudence.

In effect, the court below collapsed the "facial" and "as applied" challenges into one. Because the statute facially passes muster, the court apparently reasoned, any unconstitutional application automatically is a misapplication of the statute. Hence, rejection of a "facial" challenge per se leads to rejection of an "as applied" challenge on the grounds that the court "need not reach the issue."

This ruling of the Fourth Circuit is so extreme, perverse, and contrary to this Court's settled precedent that it warrants summary reversal. In the alternative, this Court should grant plenary review to redress the serious doctrinal confusion the decision below will spawn.

II. THIS COURT SHOULD REVIEW PETITIONERS' CHALLENGE TO FACE, 18 U.S.C. § 248.

A. The Public has a Strong Interest in Resolving the Constitutionality of FACE.

Any serious question about the constitutionality of an Act of Congress deserves review by this Court. This Court frequently reviews the constitutionality of federal statutes without waiting for a split in the appellate courts or for an appellate decision invalidating the statute. For example, there appears to have been no split of appellate authority on the constitutionality of the federal statutes at issue in Felker v. Turpin, 116 S. Ct. 2333 (1996); City of Boerne v. Flores, 117 S. Ct. 2157 (1997); or Printz v. United States, 117 S. Ct. 2365 (1997).

FACE essentially provides special federal police power

protection for one industry: abortion.[6] Furthermore, FACE targets pro-life protesters for uniquely harsh treatment and imposes vague and overbroad restrictions. FACE therefore raises important questions about the scope of Congressional power and the free speech and equal protection implications of this effort by Congress to weigh in on one side of a national controversy. See infra § II(B).

FACE has been the subject of widespread constitutional controversy, both in the courts[7] and in the scholarly literature.[8]

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[6]FACE was amended to add certain protection for access to religious facilities. 18 U.S.C. § 248(a)(2), (3). Petitioners are aware of no use of FACE to date to protect places of religious worship. In any event, the religious protection provisions of FACE are not before this Court.

[7]Opinions persuasively demonstrating the unconstitutionality of FACE, although rejected by panel majorities in their respective circuits, include those of the district courts in United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995), rev'd, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996), and in the present case, Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996), rev'd, 126 F.3d 575 (4th Cir. 1997), and by the dissents in United States v. Wilson, 73 F.3d 675, 689-702 (7th Cir. 1995) (Coffey, J., dissenting), cert. denied, 117 S. Ct. 46, 47 (1996), and United States v. Bird, 124 F.3d 667, 685-92 (5th Cir. 1997) (DeMoss, J., concurring in part and dissenting in part). Opinions upholding FACE include: Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 2431 (1997); United States v. Scott, 919 F. Supp. 76 (D. Conn. 1996); Planned Parenthood Ass'n of Southeastern Pennsylvania, Inc. v. Walton, 949 F. Supp. 290 (E.D. Pa. 1996); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 516 U.S. 809 (1995); United States v. Bird, 124 F.3d 667 (5th Cir. 1997); United States v. Soderna, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), cert. denied, 117 S. Ct. 613 (1996); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D.

As a consequence, the arguments for and against the constitutionality of FACE have been thoroughly developed and are ripe for consideration by this Court.

B. The Decision Below Conflicts With This Court's Decision in United States v. Lopez and Raises Important and Unsettled Questions of Constitutional Law.

The decision below conflicts with this Court's decision in United States v. Lopez, 514 U.S. 549 (1995). Moreover, the case at bar involves important questions of federal constitutional law which have not been, but should be, settled

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Cal. 1994); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists, 946 F. Supp. 1355 (D. Or. 1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

[8]Compare Rose & Osborn, FACE-ial neutrality: A Free Speech Challenge to the Freedom of Access to Clinic Entrances Act, 81 Va. L. Rev. 1505 (1995) (contending FACE violates First Amendment); and Note, Viewing the Constitutionality of the Access Act through the Lens of Federalism, 47 Case W. Res. L. Rev. 553 (1997) (FACE exceeds Commerce Clause power); Note, Abortion as Commerce: The Impact of United States v. Lopez on the Freedom of Access to Clinic Entrances Act of 1994, 50 Vand. L. Rev. 239 (1997) (same); with Comment, "FACE"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech? 64 U. Cin. L. Rev. 947 (1996) (defending FACE under First Amendment); and Note, "FACE"-ing the Constitution: The Battle over the Freedom of Access to Clinic Entrances Shifts from Reproductive Health Facilities to the Federal Courts, 46 Cath. U.L. Rev. 165 (1996) (defending FACE under Commerce Clause and First Amendment). See also Note, Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248: The Controversy behind the Remedy, 20 Seton Hall Legis. J. 128 (1996) (urging Supreme Court review to resolve constitutional doubts about FACE). See also Hoffman, 126 F.3d at 586 (App. 20a-21a) (listing additional sources).

by this Court.

1. FACE represents a drastic and unprecedented expansion of Congressional authority under the Commerce Clause, in conflict with Lopez.

Those courts which, like the court below, have upheld FACE, have ruled that FACE falls within the authority of Congress to regulate interstate commerce. App. 24a. In so doing, however, these courts have legitimized a new and dramatic expansion of congressional commerce power, and essentially nullified this Court's decision in Lopez.

The crux of the federal government's case is ultimately the contention that FACE directly prohibits interference with persons because they are engaged in the commercial activity of abortion. The government postulates that this fact provides the requisite nexus with interstate commerce.

The premise of this argument is that Congress has the power to prohibit interference with any business. This proposition, however, overlooks the fact that the Constitution gives Congress power over interstate commerce, not commerce per se (much less anything affecting commerce). This proposition would give Congress plenary police power over all businesses and all activities affecting businesses -- i.e., all human activity.

The Constitution establishes a federal government of limited powers, leaving all remaining powers to the states and to the people. U.S. Const. amend. X. Congress enjoys a range of enumerated powers, including the Commerce Power -- the power to "regulate Commerce . . . among the several States," id. art. I, § 8, cl. 3. This power, while broad, is not so limitless as to justify FACE.

Over the past century, the federal judiciary has approved an ever more expansive interpretation of congressional power under the Commerce Clause. E.g., Wickard v. Filburn, 317

U.S. 111 (1942) (Congress can regulate production of home-grown wheat as part of national regulatory scheme); Perez v. United States, 402 U.S. 146 (1971) (Congress can prohibit extortionate credit transactions even when conducted intrastate). Nevertheless, there are bounds to federal legislative power. If not, "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

This Court marked the limits of Commerce Clause power in the recent case of United States v. Lopez, 514 U.S. 549 (1995). In Lopez, this Court held that the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which prohibited the possession of a firearm within 1,000 feet of a school, was "invalid as beyond the power of Congress under the Commerce Clause." 514 U.S. at 552.

The Lopez Court "identified three broad categories of activity that Congress may regulate under its commerce power." Id. at 558 (citation omitted).

1. "First, Congress may regulate the use of the channels of interstate commerce," id., "for example, the shipment of stolen goods . . . or of persons who have been kidnapped," Perez, 402 U.S. at 150 (citations omitted).

2. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Lopez, 514 U.S. at 558. This category includes, "for example, the destruction of an aircraft . . . or thefts from interstate shipments," Perez, 402 U.S. at 150 (citations omitted).

3. "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." Lopez, 514 U.S. at

558-59 (citations omitted). This category includes such matters as the regulation of wheat production, Wickard, or milk prices, United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), and the prohibition of extortionate credit transactions, Perez.

The court below held that FACE qualifies as a valid enactment under the third Lopez category -- a regulation of activities that "substantially affect" interstate commerce. App. 24a. This conclusion cannot be squared with Lopez.

Lopez identified the ways in which a statute can "regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." 514 U.S. at 558-59 (citation omitted). FACE, like the Gun-Free School Zones Act, possesses none of the potential nexuses to interstate commerce.

a. *Aggregation of commercial activities*

Under Lopez, a statute can regulate "intrastate economic activity" (e.g., growing wheat or mining coal) which "substantially affect[s] interstate commerce." Lopez, 514 U.S. at 559 (emphasis added). Protest against abortion, like the possession of a gun in a school zone, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." Id. at 567 (emphasis added). The court below conceded as much. App. 23a ("the activity regulated by FACE. . . [is] not itself economic or commercial"). Nor has Congress implemented a regulatory scheme for abortion. Therefore, FACE

> is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

514 U.S. at 561.

b. *Jurisdictional element*

Second, a statute can regulate noneconomic intrastate activity if the statute contains a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." Id. For example, the federal felony gun possession statute and the federal arson statute explicitly require proof of a nexus to interstate commerce as an element of the offense. See United States v. Bass, 404 U.S. 336 (1971) (felony gun possession); Russell v. United States, 471 U.S. 858 (1985) (arson). FACE, like the Gun-Free School Zones Act, contains no such jurisdictional element.[9]

c. *Going beyond Lopez*

Because FACE neither regulates an economic activity nor contains a jurisdictional element, FACE exceeds all prior exercises of congressional Commerce Clause authority. As Judge Coffey of the Seventh Circuit observed about FACE, "A federal statute that thus regulates purely non-commercial activity, while at the same time absent jurisdictional language, is unprecedented." United States v. Wilson, 73 F.3d at 692 (dissent).

The court below sought to avoid the logical conclusion -- that FACE exceeds the constitutional bounds of congressional authority -- by adopting a novel, and deeply flawed, legal principle. The court held that Congress may regulate noncommercial activities (e.g., protest activities), without any jurisdictional language, if the regulated activities, aggregated as a whole, substantially affect an industry which involves, at least in part, interstate commerce. App. 23a-24a.

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[9]Congress could easily have chosen to follow the pattern of other federal criminal statutes by adding "in or affecting commerce," or similar language, to FACE. However, Congress chose not to do so. Hence, the constitutionality of a hypothetical amended FACE containing such language is not before this Court.

The implications of this new principle cannot be understated. This holding renders superfluous the jurisdictional language of countless federal statutes. Arson, gun possession by felons, indeed any criminal activity, in the aggregate, will substantially affect businesses which engage in interstate commerce. Hence, according to the court below, the language limiting the scope of these federal crimes to conduct specifically involving interstate commerce would be wholly unnecessary. For the same reason, Congress could pass a federal trespass, vandalism, or disorderly conduct statute (which, essentially, is what FACE represents). In all these cases, the regulated activity, viewed in the aggregate, substantially affects businesses involved in interstate commerce. Indeed, this principle has no logical limit. If the court below is correct, nothing is beyond the purview of federal legislation under the Commerce Clause. As Judge Kosinski has remarked, "[One] wonder[s] why anyone would make the mistake of calling it the Commerce Clause instead of the `Hey, you-can-do-whatever-you-feel-like Clause.'" Kosinski, Introduction to Volume Nineteen, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995).

A rationale for Commerce Clause authority cannot be accepted if the logic of that rationale would largely obliterate the distinction between state and federal power. Lopez, 514 U.S. at 564-68. For example, the argument that violent crime raises the cost of doing business, and therefore adversely affects commerce, would justify federal regulation of "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." Id. at 564 (citation omitted). Therefore, that argument cannot justify FACE any more than it could justify the Gun-Free School Zones Act. "[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." Id.

The court below also relied upon congressional findings

about the connection between anti-abortion protest and interstate commerce. App. 23a-24a. However, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Lopez, 514 U.S. at 557 n.2 (internal quotation marks and citation omitted). "Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question . . . ." Id. (editing marks, quotation marks, and citation omitted).

The alleged nexus to interstate commerce which Congress identified -- some goods, staff, or patrons of some abortion facilities cross state lines, and the activities FACE restricts are both widespread and have negative effects on businesses, see App. 24a -- applies with equal or greater force to virtually any business and any tortious or criminal activity.

If FACE is a constitutional exercise of congressional power to regulate interstate commerce, then the federal government has indeed crossed the Rubicon. Congress may, on this theory, regulate non-commercial, intrastate activity with no jurisdictional element tying the activity to interstate commerce.

FACE represents a tremendously significant attempted expansion of congressional power. This Court should grant review and rebuff this expansion as unconstitutional.

2. FACE imposes discriminatory, vague, and overbroad restrictions on expressive activity.

With FACE, Congress deliberately singled out the opponents of abortion for selectively harsh treatment. While protesters on other subjects or with other viewpoints receive slaps on the wrist, or even are lionized,[10] even exclusively

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[10]See, e.g., "Jackson Freed," USA Today, Feb. 12, 1997, p. 3A

nonviolent pro-life demonstrators face a $10,000 fine and six months imprisonment for the first offense; subsequent offenses are felonies. See § 248(b). If FACE passes constitutional muster under the First and Fifth Amendments, then Congress (and the states, despite the Fourteenth Amendment) may likewise target other disfavored political and social movements for special restrictions and penalties.

a. *First Amendment rights are implicated.*

There is no question that petitioners' expressive activities implicate First Amendment rights. Pro-life picketing and sidewalk counseling are core First Amendment activities. Schenck v. Pro-Choice Network of Western New York, 117 S. Ct. 855, 867 (1997). Furthermore, "as a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." Id. at 870 (internal quotation marks, editing marks, and citations omitted).

The First Amendment protects speech on political and social issues even if the speech is "intended to exercise a coercive impact" and is "offensive to others." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). Political expression having the effect of intimidation is constitutionally protected speech. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).[11] Political speech that creates an apprehension

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(Jesse Jackson only facing charge of disorderly conduct for "blocking access to [a Chicago] construction site" as part of a protest "for black truckers"; judge releasing Jackson "later shook Jackson's hand").

[11]"[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969). Only advocacy "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action" is

of fear is also constitutionally protected. Id. Moreover, if speech is offensive and emotionally unsettling, "that consequence is a reason for according it constitutional protection." Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (internal quotations marks and citations omitted); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

b. *FACE is a viewpoint-based ban on speech.*

This Court has held that any viewpoint discrimination against speech is unconstitutional. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). The government may not "impose special prohibitions on those speakers who express views on disfavored subjects," R.A.V., 505 U.S. at 391.

It is abundantly clear that FACE is viewpoint-based, and therefore unconstitutional. In its restrictions on "intimidation," "physical obstruction," blocking of access to medical buildings, or vandalism, FACE targets only those who act "because [a] person is . . . obtaining or providing reproductive health services," Sec. 284(a)(1), or "because [a] facility provides reproductive health services," Sec. 248(a)(3). FACE thus discriminates against anti-abortion protest activity while leaving untouched pro-abortion protests and protests on other subjects.

Indeed, the legislative history is explicit on this point:

> Thus, for example, if an environmental group blocked passage to a hospital where abortions happen to be performed, but did so as part of a demonstration over harmful emissions produced by the facility, the demonstrators would not violate this Act (though their

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unprotected. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

> conduct might violate some other law, such as local trespass law). In that example, the demonstrators' motive is related to the facility's emissions policy and practices and not to its policy and practices on abortion-related services.

S. Rep. No. 117, 103rd Congress, 1st Sess. 24 (1993) (emphasis added).

Concrete examples further illustrate this lack of viewpoint neutrality. Consider the case of a multi-tenant medical center with three entrances. At one entrance, animal rights activists block the door to halt mistreatment of laboratory animals at a research lab inside the center. At a second entrance, labor union members hold a sit-down strike blocking the door to protest unfair wages for maintenance workers in the center. At a third entrance, anti-abortion activists conduct a "sit-in" to prevent the practice of abortion at a facility inside the center. FACE only applies to the anti-abortion activists. See Sec. 248(a)(1). Consider a freestanding abortion center in an inner-city location. A teenager, outraged that his girlfriend aborted their child, spray paints "DEATH CAMP" on the side of the building. Another teenager, who belongs to a gang called "Warriors," spray paints "WARRIORS RULE" on the same building. FACE only applies to the anti-abortion graffiti writer. See Sec. 248(a)(3). Consider an abortion facility where pro-abortion escorts gather outside in order to hamper anti-abortion "sidewalk counseling." A woman walks up the sidewalk, and an anti-abortion counselor approaches to offer literature and information. A pro-abortion escort then physically blocks the anti-abortion counselor and shoves the counselor aside. The counselor then shoves the escort back. FACE only applies to the anti-abortion counselor. See Sec. 248(a)(1).

This glaringly selective imposition of legal restrictions on the basis of viewpoint clearly violates the First Amendment. For instance, this Court has held that government may forbid all use of public school premises after hours, but may not

forbid use only by those who wish to address a topic from a religious viewpoint. Lamb's Chapel v. Center Moriches Union Free School Dist. Government may forbid all arson in certain locales, but may not forbid only burning a flag to desecrate it. Texas v. Johnson, 491 U.S. 397 (1989). Government may forbid all trespass and vandalism at facilities, but may not forbid only trespass and vandalism in the name of racial bigotry. R.A.V. v. City of St. Paul. Government may forbid all targeted, single-residence residential picketing, Frisby v. Schultz, 487 U.S. 474 (1988), but may not forbid only nonlabor residential picketing. Carey v. Brown, 447 U.S. 455 (1980). See also Schacht v. United States, 398 U.S. 58, 62-63 (1970) (invalidating a law that allowed wearing military uniforms only in dramatic portrayals that did not "tend to discredit" the military). FACE violates the basic constitutional principle of neutrality, "which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J. concurring).[12]

It is true that FACE also would proscribe pro-abortion blockades at pro-life pregnancy centers. But to say that FACE is viewpoint-neutral because it covers this counterfactual, hypothetical scenario is like saying a ban on pollution-related protests is viewpoint-neutral because it would also ban pro-pollution protests. Such an argument is plainly pretextual.

More fundamentally, the pregnancy center hypothetical simply shows that FACE's viewpoint-discrimination can apply in other settings beyond abortion facilities. At pregnancy centers, environmental protesters, labor protesters, and supporters of the center are not covered, while pro-

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[12]This principle finds embodiment both in the free speech guarantee of the First Amendment and in the right to equal protection under the Fifth and Fourteenth Amendments. See R.A.V., 505 U.S. at 384 n.4; Police Dep't v. Mosley, 408 U.S. 92 (1972); Carey v. Brown.

abortion protesters are. Thus, whether at an abortion center or at a crisis pregnancy center, FACE targets one particular viewpoint -- namely, those opposing the center's abortion (or pregnancy aid) practice -- thereby unconstitutionally "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." R.A.V., 505 U.S. at 392.[13]

c. *FACE is vague and overbroad.*

FACE also suffers from unconstitutional vagueness and overbreadth.

"First Amendment freedoms need breathing space to survive." NAACP v. Button, 371 U.S. 415, 433 (1963). As a result, "the First Amendment recognizes that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." City of Houston v. Hill, 482 U.S. at 472. When a law lacks clearly defined prohibitions, that law unconstitutionally threatens speech through the twin vices of vagueness and overbreadth. FACE is both vague and overbroad.

i. vagueness

The text of FACE -- set forth in an appendix -- raises a host of interpretive difficulties that engender unconstitutional vagueness, as well as overbreadth.

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[13]The addition to FACE of language that extends its prohibitions and punishments to unlawful protest activities at places of religious worship, as well as at abortion facilities, does not redeem the law. Sec. 248(a)(2) and (3). A law penalizing two viewpoints is no less unconstitutional than a law penalizing just one viewpoint. See R.A.V. (ordinance applied to religious bigotry as well as racial bigotry).

-- "Force or Threat of Force": Does this include a nonviolent "sit-in"? Calling someone a murderer? Warning someone that he may go to Hell? Sec. 248(a)(1).

-- "Physical Obstruction": What does it mean to render passage to or from a facility "unreasonably difficult?" Sec. 248(e)(4). Is it "unreasonably difficult" to walk through a picket line? Be forced to walk around a persistent sidewalk counselor? Step over people engaged in a "sit-in"? Wait twenty minutes while police arrest participants in a "rescue" blockade?[14]

-- "Injures": FACE says "injures" in section 248(a) but elsewhere refers to "bodily injury," Sec. 248(b). Therefore, the verb "injures" standing alone apparently includes causing other, non-bodily injuries. Does this include any legal injury? Emotional injury? Injury to constitutional rights?

-- "Interfere With": FACE defines this term as "restrict[ing] a person's freedom of movement." Sec. 248(e)(2). But by merely existing and occupying space, everyone necessarily "restricts the freedom of movement" of everyone else by diminishing the space available for movement. While a literal interpretation of this text is clearly absurd, where is the line to be drawn?

-- "Intimidates": The phrase "reasonable apprehension of bodily harm to him- or herself or to another" opens up a range of possible meanings. Sec. 248(e)(3). If FACE had defined "intimidate" to mean "to place a person in reasonable apprehension of imminent bodily harm from the actor to

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[14]This Court has held that the Constitution affords persons the opportunity to win the attention of the listener. Kovacs v. Cooper, 336 U.S. 921 (1949). If "physical obstruction" means merely being forced to walk around a pro-life leafletter, it is plainly unconstitutional. Lee v. ISKCON, 505 U.S. 830 (1992) (ban on leafletting in airport terminal violates First Amendment).

him or herself," it would approximate the concept of assault. See 6 Am. Jur. 2d Assault and Battery § 3 (1963). FACE, however, departs markedly from this concept: first, the threatened harm need not be imminent; second, the threatened harm need not come from the person allegedly violating FACE; third, the threatened harm may be to another person other than the one in reasonable apprehension of the harm.

These features of FACE yield a drastically broadened concept of "intimidation." FACE criminalizes anti-abortion "threats" if they "intimidate" by placing another person in reasonable apprehension of harm sometime to someone from something.

The breadth of this definition is astonishing. Warning any listener of the physical perils of abortion will, if persuasive, likely induce reasonable apprehension of bodily harm to those seeking abortion. Merely saying, "If you (or your friend, wife, daughter, etc.) have an abortion, you may die (or become sterile, hemorrhage, get infections, get breast cancer, etc.)" could, especially if backed up with medical statistics or personal accounts, induce "reasonable apprehension of bodily harm" to someone. True, the apprehension comes from the medical information. True, the harm feared may or may not be imminent. True, the harm feared would come from the abortion, not the sidewalk counselor. True, the harm may be to someone else. But FACE takes none of these factors into consideration. "Threatening" the medical harms of abortion appears to trigger FACE.

ii. overbreadth

FACE's overbreadth is amply illustrated in the preceding section. FACE is also overbroad because it is not geographically limited. It purports to protect access to abortion facilities because of problems arising at those locations, yet restricts communicative activities without regard to proximity to such facilities. E.g., Lucero v. Trosch, 904 F. Supp. 1336 (S.D. Ala. 1995) (FACE civil suit predicated

on remarks made on "Geraldo" TV show). Nor is FACE limited temporally, i.e., to interference with specific, impending abortions. Id.

Given the extraordinary penalties and civil remedies available to punish violations, FACE doubtless has a severe chilling effect on entirely lawful (indeed, constitutionally protected) anti-abortion expression at abortion facilities. In this context, the substantial overbreadth of FACE's prohibitions render it unconstitutional. See Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 574 (1987); Houston v. Hill, 482 U.S. at 458-59; New York v. Ferber, 458 U.S. 747, 769 (1982).

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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February 12, 1998

Appendix

APPENDIX A

Nos. 96-1581, 96-1582 and 96-1623.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHARON HOFFMAN; TRUDIE MATTHEWS; DIANE HOEFLING; RONNIE WALLACE, Reverend; JOHN BRADLEY, Reverend

Plaintiffs-Appellees

v.

JAMES B. HUNT, JR., Governor; STATE OF NORTH CAROLINA;

Defendants-Appellants

and

D.R. STONE; CHARLOTTE-MECKLENBURG POLICE DEPARTMENT; UNITED STATES OF AMERICA

Defendants

- - - - - - - - - - - - - - -

AMERICAN MEDICAL WOMEN'S ASSOCIATION; FEMINIST MAJORITY FOUNDATION; MEDICAL STUDENTS FOR CHOICE; NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE; NATIONAL CENTER FOR PRO CHOICE MAJORITY; NATIONAL ORGANIZATION FOR WOMEN; NATIONAL WOMEN'S LAW CENTER; WOMEN'S LEGAL DEFENSE FUND; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED;

AMERICAN CIVIL LIBERTIES UNION; PLANNED PARENTHOOD OF THE TRIAD, INCORPORATED; PLANNED PARENTHOOD OF THE SOUTHERN PIEDMONT AND CAROLINA MOUNTAINS, INCORPORATED; UNITED STATES JUSTICE FOUNDATION; NORTH CAROLINA FAMILY POLICY COUNCIL; FOCUS ON THE FAMILY; FAMILY RESEARCH COUNCIL; PLANNED PARENTHOOD FEDERATION OF AMERICA, INCORPORATED; NATIONAL ABORTION FEDERATION

Amici Curiae

SHARON HOFFMAN; TRUDIE MATTHEWS; DIANE HOEFLING; RONNIE WALLACE, Reverend; JOHN BRADLEY, Reverend

Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA

Defendant-Appellant

and

JAMES B. HUNT, JR., Governor; STATE OF NORTH CAROLINA; D.R. STONE; CHARLOTTE-MECKLENBURG POLICE DEPARTMENT

Defendants

- - - - - - - - - - - - - - -

PLANNED PARENTHOOD FEDERATION OF AMERICA, INCORPORATED; AMERICAN MEDICAL WOMEN'S ASSOCIATION; FEMINIST MAJORITY FOUNDATION; MEDICAL STUDENTS FOR CHOICE; NATIONAL

ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE; NATIONAL CENTER FOR PRO CHOICE MAJORITY; NATIONAL ORGANIZATION FOR WOMEN; NATIONAL WOMEN'S LAW CENTER; SOUTH CAROLINA NATIONAL ORGANIZATION FOR WOMEN; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED; AMERICAN CIVIL LIBERTIES UNION; PLANNED PARENTHOOD OF THE TRIAD, INCORPORATED; PLANNED PARENTHOOD OF THE SOUTHERN PIEDMONT AND CAROLINA MOUNTAINS, INCORPORATED; UNITED STATES JUSTICE FOUNDATION; NORTH CAROLINA FAMILY POLICY COUNCIL; FOCUS ON THE FAMILY; FAMILY RESEARCH COUNCIL

Amici Curiae

SHARON HOFFMAN; TRUDIE MATTHEWS; DIANE HOEFLING; RONNIE WALLACE, Reverend; JOHN BRADLEY, Reverend

Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA

Defendant-Appellant

and

JAMES B. HUNT, JR., Governor; STATE OF NORTH CAROLINA; D.R. STONE; CHARLOTTE-MECKLENBURG POLICE DEPARTMENT

Defendants

PLANNED PARENTHOOD FEDERATION OF AMERICA, INCORPORATED; AMERICAN MEDICAL WOMEN'S ASSOCIATION; FEMINIST MAJORITY FOUNDATION; MEDICAL STUDENTS FOR CHOICE; NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE; NATIONAL CENTER FOR PRO CHOICE MAJORITY; NATIONAL ORGANIZATION FOR WOMEN; NATIONAL WOMEN'S LAW CENTER; SOUTH CAROLINA NATIONAL ORGANIZATION FOR WOMEN; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED; AMERICAN CIVIL LIBERTIES UNION; PLANNED PARENTHOOD OF THE TRIAD, INCORPORATED; PLANNED PARENTHOOD OF THE SOUTHERN PIEDMONT AND CAROLINA MOUNTAINS, INCORPORATED; UNITED STATES JUSTICE FOUNDATION; NORTH CAROLINA FAMILY POLICY COUNCIL; FOCUS ON THE FAMILY; FAMILY RESEARCH COUNCIL

Amici Curiae

Argued April 9, 1997.
Decided Sept. 19, 1997.

Before RUSSELL, WILKINS, and WILLIAMS, Circuit Judges.

OPINION

WILKINS, Circuit Judge:

We are convened to review a decision of the district court holding two statutes--one enacted by the General Assembly of North Carolina and the other enacted by the Congress of the United States--to be unconstitutional. *See Hoffman v. Hunt*, 923 F.Supp. 791 (W.D.N.C.1996). The district

court held that a North Carolina law criminalizing the obstruction of access to or egress from health care facilities, *see* N.C. Gen.Stat. § 14-27 7.4 (Supp.1996),[1] is violative of the First Amendment on its face and as applied. *See Hoffman*, 923 F.Supp. at 802-05. And, it held that a portion of the Freedom of Access to Clinic Entrances Act (FACE) of 1994, *see* 18 U.S.C.A. § 248 (West Supp.1997),[2] violates the United States Constitution. *See Hoffman*, 923 F.Supp. at 823. We reverse.

I. *Facts and Procedural Background*

Plaintiffs--Sharon Hoffman, Trudie Matthews, Diane Hoefling, Ronnie Wallace, and John Bradley--are North Carolina residents who oppose abortion for moral, religious,

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[1]N.C. Gen.Stat. § 14-277.4 provides, in pertinent part:

(a) No person shall obstruct or block another person's access to or egress from a health care facility or from the common areas of the real property upon which the facility is located in a manner that deprives or delays the person from obtaining or providing health care services in the facility.

....

(e) This section shall not prohibit any person from engaging in lawful speech or picketing which does not impede or deny another person's access to health care services or to a health care facility or interfere with the delivery of health care services within a health care facility.

N.C. Gen.Stat. § 14-277.4(a), (e).

[2]FACE established civil and criminal penalties for anyone who, in pertinent part,

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C.A. § 248(a)(1).

and scientific reasons. Their opposition has motivated them to engage in demonstrations outside facilities in North Carolina where abortions are performed. Their activities include leafleting, picketing, sidewalk counseling, and other nonviolent forms of protest designed to persuade women seeking abortions to consider alternative means of confronting an unwanted pregnancy. Additionally, Plaintiffs aspire to convince health care professionals not to perform abortions. During their participation in protests outside North Carolina clinics where abortions are performed, Plaintiffs have not engaged in "rescues"--*i.e.*, blocking women seeking abortions and health care workers from entering clinics--and have attempted to avoid arrest by complying with instructions from law enforcement officers concerning conduct and acts prohibited by various North Carolina laws, including § 14-277.4. Nevertheless, Plaintiffs have been threatened with arrest for conduct that did not obstruct or block access to or egress from health care facilities. Because Plaintiffs believed that these enforcement efforts violated their First Amendment rights, they filed this action challenging the constitutionality of § 14-277.4 on its face and as applied to them.[3] While this lawsuit was pending before the district court, Congress enacted FACE. Plaintiffs amended their complaint to add a challenge to subsection (a)(1) of that statute on the basis that Congress lacked the authority to enact it under the Commerce Clause or § 5 of the Fourteenth Amendment and that it violated the First Amendment.[4]

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[3]Plaintiffs initially brought this action against the State of North Carolina; Governor James B. Hunt, Jr.; the Charlotte-Mecklenburg Police Department; and an individual local law enforcement officer. Early in the litigation, the district court dismissed the Charlotte-Mecklenburg Police Department; Plaintiffs have not appealed this ruling. And, Plaintiffs voluntarily dismissed the action as to the individual law enforcement officer. We refer to the remaining state defendants collectively as "North Carolina."

[4]The district court provided notice to the Attorney General of the United States that the constitutionality of FACE had been

Because we were then considering a constitutional challenge to FACE, the district court placed this litigation in abeyance pending the decision of this court in *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir.1995). Following the February 13, 1995 decision in *American Life League*--which upheld the constitutionality of FACE under the Commerce Clause and the First Amendment--but before the district court had ruled in this action, the Supreme Court decided *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). *Lopez* held that Congress lacked authority under the Commerce Clause to enact the Gun-Free School Zones Act of 1990, *see* 18 U.S.C. § 922(q) (Supp. V 1994), which prohibited the possession of "a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Lopez*, 514 U.S. at 551, 115 S.Ct. at 1626 (internal quotation marks omitted). Believing that *Lopez* cast considerable doubt on the continuing validity of *American Life League*, the district court sought additional briefing directed to that issue.

Thereafter, the district court conducted an evidentiary hearing with respect to the enforcement of § 14-277.4. During that hearing, Plaintiffs offered evidence concerning their experiences while participating in abortion protests. Defendants elected not to submit any evidence. Based on the testimony presented, the district court rendered findings of fact that are not challenged on appeal. Specifically, the district court found:

> Police have interpreted [§ 14-277.4] in different ways and have difficulty deciding the meaning of the words "interfere", "obstruct", "impede", and "delay."
>
> The Plaintiffs have attempted to have police define for them exactly what they may and may not do in order to

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drawn into question. *See* 28 U.S.C.A. § 2403(a) (West 1994). Thereafter, the district court granted the motion of the United States to intervene.

comply with the statute, but have received varying interpretations from police officers.

There are different interpretations in different police districts and among police in the same district. For example, ... [s]ome officers prohibit the handing out of leaflets to occupants of automobiles entering the clinic because that will impede traffic and constitute interference under the statute. Some officers allow the picketers to wave pro-life literature to get the attention of persons entering the driveway. Others do not. Some officers allow the leafletters to yell to people in the parking lot, others don't.

Hoffman, 923 F.Supp. at 800 (citations omitted).

Based on Plaintiffs' evidence, the district court held that § 14-277.4 was unconstitutional under the First Amendment, both on its face and as applied. *See id.* 923 F.Supp. at 802-05. The district court also ruled that in enacting FACE Congress had exceeded its authority under the Commerce Clause and under § 5 of the Fourteenth Amendment and, further, that FACE was violative of the First Amendment. *See id.* 923 F.Supp. at 805-23. Consequently, the district court permanently enjoined the enforcement of both the state and federal statutes. *See id.* 923 F.Supp. at 823. We address these holdings in turn.[5]

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[5]In addition to the briefing we received from the parties, we accepted amici curiae briefs from Planned Parenthood Federation of America, Incorporated; NOW Legal Defense and Education Fund; Center for Reproductive Law and Policy; American Medical Women's Association; Feminist Majority Foundation; Medical Students for Choice; National Abortion and Reproductive Rights Action League; National Abortion Federation; National Center for the Pro Choice Majority; National Organization for Women; National Women's Law Center; South Carolina National Organization for Women; Women's Law Project; Women's Legal Defense Fund; American Civil Liberties Union of North Carolina

II. *First Amendment Challenge to § 14-277.4*

North Carolina challenges the determination of the district court that N.C. Gen.Stat. § 14-277.4 is unconstitutional on its face and as applied. That statute provides, in pertinent part:

> (a) No person shall obstruct or block another person's access to or egress from a health care facility or from the common areas of the real property upon which the facility is located in a manner that deprives or delays the person from obtaining or providing health care services in the facility.
>
> ....
>
> (e) This section shall not prohibit any person from engaging in lawful speech or picketing which does not impede or deny another person's access to health care services or to a health care facility or interfere with the delivery of health care services within a health care facility.

N.C. Gen.Stat. § 14-277.4(a), (e). The district court held that this provision was invalid on its face as impermissibly vague and overbroad and that it had been applied to Plaintiffs in an unconstitutional manner.

We agree with North Carolina that the statute, on its face, is neither vague nor overbroad. But, we need not reach the question of whether it has been applied unconstitutionally.

Legal Foundation, Incorporated; American Civil Liberties Union; Planned Parenthood of the Triad, Incorporated; Planned Parenthood of the Southern Piedmont and Carolina Mountains, Incorporated; United States Justice Foundation; North Carolina Family Policy Council; Focus on the Family; and Family Research Council, Incorporated. We thank the amici for their participation.

A.

The First Amendment provides, *inter alia*, that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. And, "[i]t has long been established that" First Amendment rights "are protected by the Fourteenth Amendment from invasion by the States." *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963). Here, Plaintiffs alleged that North Carolina violated their First Amendment right of free speech by enacting a statute that is both vague and overbroad.

The district court concluded that the North Carolina statute was impermissibly vague because the evidence before the court established that law enforcement officers had given differing, and sometimes inconsistent, interpretations of the statute in the course of enforcing it. The court reasoned that the officers' differing views regarding the proper meaning of the statute compelled the conclusion that the statute did not give a person of ordinary intelligence reasonable notice of what conduct is prohibited. *See Hoffman*, 923 F.Supp. at 802-04 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

We hold, however, that § 14-277.4 is not impermissibly vague. The operative language--declaring that "[n]o person shall obstruct or block another person's access to or egress from a health care facility ... in a manner that deprives or delays the person from obtaining or providing health care services"--sets forth in plain and simple terms the prohibited conduct. N.C. Gen.Stat. § 14-277.4(a). The terms "obstruct" and "block" do not require those subject to the statute to guess at their meaning. *See Cameron v. Johnson*, 390 U.S. 611, 616, 88 S.Ct. 1335, 1338, 20 L.Ed.2d 182 (1968). The term "obstruct" means "to block or close up by an obstacle." *Webster's Ninth New Collegiate Dictionary* 816 (1990). Similarly, to "block" something is "to make [it] unsuitable for passage or progress by obstruction." *Id.* at 160. According to its plain language, then, the statute prohibits only conduct that

physically interferes with a person's ability to enter or to exit a health care facility in a specified manner. *See Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990) (observing that courts must "giv[e] the words used their ordinary meaning" (internal quotation marks omitted)). Because the statutory language "clearly and precisely delineates its reach in words of common understanding," it is not void on its face for vagueness. *Cameron*, 390 U.S. at 616, 88 S.Ct. at 1338 (holding that statute prohibiting conduct that "obstruct[s] or unreasonably interfere[s] with free ingress or egress to and from" public buildings was not impermissibly vague).

We also disagree with the determination of the district court that the statute is overbroad because it authorizes the arrest of persons whose peaceful protests achieved the intended goal of persuading women not to have abortions. *See Hoffman*, 923 F.Supp. at 804-05. As explained above, the plain language of the statute prohibits only conduct that imposes physical impediments to entering or exiting a health care facility. As the Supreme Court has held, "[p]rohibition of [such] conduct ... does not abridge constitutional liberty 'since such activity bears no necessary relationship to the freedom to ... distribute information or opinion.' " *Cameron*, 390 U.S. at 617, 88 S.Ct. at 1339 (fourth alteration in original) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939)). Accordingly, because § 14-277.4 does not, on its face, encumber a substantial amount of protected expression, it is not overbroad. *See New York v. Ferber*, 458 U.S. 747, 766-73, 102 S.Ct. 3348, 3359-63, 73 L.Ed.2d 1113 (1982).

Moreover, subsection (e) does not render the statute overbroad, despite Plaintiffs' argument to the contrary. Subsection (e) provides that subsection (a) does not apply to "any person ... engaging in lawful speech or picketing which does not impede or deny another person's access to health care services." N.C. Gen.Stat. § 14-277.4(e). This provision is nothing more than a savings clause, designed to assure

that the North Carolina statute is not construed to reach constitutionally protected speech that does not impede or deny access to health care facilities. By its terms, subsection (e) prohibits nothing; rather, it serves as a rule of construction. *See Garnett By and Through Smith v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 644-45 (9th Cir.1993). Thus, subsection (e) does not criminalize constitutionally protected speech.

B.

The district court also ruled that § 14-277.4 had been applied in an unconstitutional manner. *See Hoffman*, 923 F.Supp. at 805. We agree with the district court that the uncontroverted evidence shows that law enforcement officers have threatened Plaintiffs with arrest under the statute for engaging in constitutionally protected activities. For example, individuals have been threatened with arrest for attempting to distribute literature to persons entering clinics. *See id.* 923 F.Supp. at 800. On another occasion, a protestor was informed that her mere presence--and the presence of other picketers--violated the statute because patients were rescheduling their appointments. *See id.* 923 F.Supp. at 798. Peaceful leafletting and picketing are both forms of expression meriting First Amendment protection, *see United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983), and the record provides no indication that the activities in which Plaintiffs engaged physically obstructed or blocked access to or egress from health care facilities. Thus, the application of § 14-277.4 to such conduct would present a substantial constitutional question.

Indeed, North Carolina does not dispute that the statute has been enforced in an unconstitutional manner. Instead, it argues that because Plaintiffs have never been arrested for a violation of § 14-277.4, they do not have standing to challenge its application. But, this argument is misplaced. It is well settled that a genuine threat of enforcement is sufficient to confer standing to obtain a declaratory judgment concerning whether the threatened application would violate the First

Amendment. *See Steffel v. Thompson*, 415 U.S. 452, 459, 475, 94 S.Ct. 1209, 1215-16, 1223- 24, 39 L.Ed.2d 505 (1974).[6]

However, we need not reach the constitutional question if there exists an alternative, nonconstitutional basis for our decision. *See Peters v. Hobby*, 349 U.S. 331, 338, 75 S.Ct. 790, 793-94, 99 L.Ed. 1129 (1955). Accordingly, before deciding whether application of § 14-277.4 to protected speech would violate the First Amendment, we first determine whether the statute permits such an application. *See id.* (examining whether action taken by loyalty review board was consistent with the power granted to the board by executive order before considering whether the action was constitutional). As discussed above, § 14-277.4 does not reach protected speech. Accordingly, it is not violated by peaceful protest activity that does not physically obstruct or block access to or egress from a health care facility. Because law enforcement officers exceeded their authority in threatening Plaintiffs with arrest for activities that did not violate § 14- 277.4, we need not determine whether these threats also contravened the First

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[6]We note that North Carolina has never argued that it is immune from suit under the Eleventh Amendment. *See Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974) (noting that "this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens"). Given that the possibility of sovereign immunity has been ignored by all of the parties throughout the lengthy history of this litigation, we are not inclined to exercise our discretion to consider immunity at this juncture. *See Patsy v. Board of Regents*, 457 U.S. 496, 515 n. 19, 102 S.Ct. 2557, 2567, 73 L.Ed.2d 172 (1982); *Biggs v. Meadows*, 66 F.3d 56, 60 (4th Cir.1995). Because North Carolina remains a party to this litigation, providing an appropriate defendant for an award of declaratory relief, we need not decide whether the Governor is sufficiently connected with the enforcement of § 14-277.4 so as to make him a proper defendant. *See Ex parte Young*, 209 U.S. 123, 157, 28 S.Ct. 441, 452-53, 52 L.Ed. 714 (1908).

Amendment.

III. *Commerce Clause Analysis of FACE*

The Founding Fathers sought through the Constitution to devise a form of government in which the opportunity for the governing to tyrannize the governed would be minimized through a system of offsetting and separated powers. A paramount component of their design was the establishment of a federal government of limited and enumerated powers and the recognition that state governments possess all remaining " 'numerous and indefinite' " powers. *United States v. Lopez*, 514 U.S. 549, 552, 115 S.Ct. 1624, 1626, 131 L.Ed.2d 626 (1995) (quoting The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)). As with the separation of powers among the coordinate branches of the federal government, this segregation of power between state and federal governments was designed to reduce the danger of oppression inherent in unchecked power. *See id.*

One of the enumerated powers apportioned to the federal government is contained in the Commerce Clause, which provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. From early in our history as a nation, the Commerce Clause has been understood as a broad grant of the power "to prescribe the rule[s] by which commerce is to be governed," limited only by constitutional constraints. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824).

We need not restate the development of Commerce Clause jurisprudence for discussions of its evolution abound. *See, e.g., Lopez*, 514 U.S. at 553-59, 115 S.Ct. at 1626-30; Steven A. Delchin, Note, *Viewing the Constitutionality of the Access Act Through the Lens of Federalism*, 47 Case W. Res. L.Rev. 553, 559-74 (1997). Suffice it to say that by late 1994 and early 1995, when the appeal in *American Life League* was under deliberation, the principles governing the analysis of

Congress' authority under the Commerce Clause were considered to be firmly established. The Supreme Court had "made clear that the commerce power extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities of interstate commerce ... or persons or things in commerce,' but also to 'activities affecting commerce.' " *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276-77, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1(1981) (alteration in original) (quoting *Perez v. United States*, 402 U.S. 146, 150, 91 S.Ct. 1357, 1359, 28 L.Ed.2d 686 (1971)). Further, it was well established that when a reviewing court attempted to determine whether Congress had exceeded its commerce power, its task was merely to ask whether a rational basis existed for concluding that the regulated activity affected interstate commerce. *See id.* This standard of review was so deferential to congressional judgment, and the transformation from a local to a national economy so complete, that it was widely accepted that Congress possessed virtually unlimited authority to legislate under the Commerce Clause. *See, e.g.*, Deborah Jones Merritt, *Commerce!*, 94 Mich. L.Rev. 674, 675 (1995). Indeed, it had been approximately 60 years since the Supreme Court had invalidated any provision adopted by Congress as exceeding its commerce power.

Against this legal background, this court decided *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir.1995), in which we applied these well-settled rules of Commerce Clause adjudication to FACE and held that the extensive legislative record provided a rational basis for Congress to conclude "that the regulated activity affects interstate commerce." *Id.* 47 F.3d at 647. We pointed to the following facts upon which Congress relied to find that interstate commerce was threatened by the activity regulated by FACE: "Many women travel across state lines to seek reproductive health care"; "[r]eproductive health facilities engage doctors and other staff in an interstate market"; "[t]hese facilities buy medical and office supplies that move in interstate commerce"; and "[c]linics have been closed because of

blockades and sabotage and have been rendered unable to provide services." *Id.* (internal quotation marks omitted). Based on these findings, we held "that the commerce power permits Congress to regulate activities affecting reproductive health services." *Id.*

The United States argues that the district court erred in failing to follow *American Life League* and that our analysis of whether, in enacting FACE, Congress acted within its authority to regulate activities that substantially affect interstate commerce is controlled by that opinion. "A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or 'a superseding contrary decision of the Supreme Court.' " *Etheridge v. Norfolk & Western Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir.1993) (quoting *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir.1990)). Since there has been no intervening en banc decision calling *American Life League* into question, we are bound by our prior opinion unless it proves untenable in light of the later Supreme Court decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). *See United States Dep't of Health & Human Servs. v. FLRA*, 983 F.2d 578, 581-82 (4th Cir.1992) ("A decision by a panel of this court, or by the court sitting en banc, does not bind subsequent panels if the decision rests on authority that subsequently proves untenable."); *Faust v. South Carolina State Highway Dep't*, 721 F.2d 934, 940 (4th Cir.1983) (same). For the reasons that follow, we conclude that the result of *American Life League* controls our decision.

Because the reasoning expressed in *Lopez* is of considerable importance to our decision, we recite it in some detail. In the course of reviewing the historical development of Commerce Clause jurisprudence, the *Lopez* Court emphasized that even the modern-era decisions giving an expansive reading to Congress' commerce power stress that there are "outer limits" to that authority:

> [T]he scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Id. at 556-57, 115 S.Ct. at 1628-29 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893 (1937)). And, the Court noted that it had "heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557, 115 S.Ct. at 1629. Thus, although the Commerce Clause granted Congress broad authority " 'to regulate commerce,' " *id.* (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, 88 S.Ct. 2017, 2023-24, 20 L.Ed.2d 1020 (1968)), the Court continued, Congress may not " 'use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities,' " *id.* (quoting *Wirtz*, 392 U.S. at 196 n. 27, 88 S.Ct. at 2024 n. 27).

Bearing these principles in mind, the Court then set forth the three broad categories of activity that Congress may regulate consistent with the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558-59, 115 S.Ct. at 1629-30 (citations omitted).

With respect to the last category, the Court explained that despite a lack of clarity in its earlier cases, "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce," not whether the activity merely "affects" interstate commerce. *Id.* at 559, 115 S.Ct. at 1630.

Turning to application of these principles to § 922(q), the Court quickly dismissed the first two categories--the regulation of the channels of interstate commerce and of the instrumentalities of, or persons or things traveling in, interstate commerce--as possible bases for Congress' adoption of § 922(q) and focused its attention on whether the final category could support the statute. *See id.* The Court first discussed whether § 922(q) could "be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce" and concluded that it could not. *Id.* at 561, 115 S.Ct. at 1631. The Court noted that it had "upheld a wide variety of congressional Acts regulating intrastate economic activity where [it had] concluded that the activity substantially affected interstate commerce," citing as examples the regulation of surface coal mining in *Hodel*, 452 U.S. at 276-83, 101 S.Ct. at 2360-63; of extortionate credit transactions in *Perez*, 402 U.S. at 150-57, 91 S.Ct. at 1359-63; of restaurants utilizing substantial interstate supplies in *Katzenbach v. McClung*, 379 U.S. 294, 301-05, 85 S.Ct. 377, 382-84, 13 L.Ed.2d 290 (1964); of hotels catering to interstate travelers in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253-58, 85 S.Ct. 348, 355-58, 13 L.Ed.2d 258 (1964); and of the production and consumption of homegrown wheat in *Wickard v. Filburn*, 317 U.S. 111, 118-29, 63 S.Ct. 82, 85-91, 87 L.Ed. 122 (1942). *Lopez*, 514 U.S. at 559-60, 115 S.Ct. at 1629-30. The Court characterized this body of case law as establishing a clear pattern holding that congressional regulation of economic activity that substantially affects interstate commerce will be upheld. *See id.* at 560, 115 S.Ct. at 1630. Pointing to *Wickard*--which the Court indicated was "perhaps the most far reaching

example of Commerce Clause authority over intrastate activity"--the Court stressed that even the regulation of homegrown wheat intended for home consumption at issue there "involved economic activity in a way that the possession of a gun in a school zone does not." *Id.* The Court thus held that § 922(q) did not fit within this pattern because:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561, 115 S.Ct. at 1630-31 (footnote omitted).

The Court next stressed that § 922(q) contained no express jurisdictional element to insure through case-by-case examination that the possession at issue had a connection with or an effect on interstate commerce. *See id.* And, although recognizing that a reviewing court must undertake an independent evaluation of the constitutionality of congressional action pursuant to the commerce power and observing that Congress "normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," the Court noted that Congress had made no legislative findings "regarding the effects upon interstate commerce of gun possession in a school zone" that could enable the Court "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Id.* at 562-63, 115 S.Ct. at 1631-32 (internal quotation marks omitted).

Finally, the Court rejected the Government's arguments that § 922(q) in fact substantially affected interstate commerce. *See id.* at 563-66, 115 S.Ct. at 1631-33. The Government had maintained that possession of a firearm in a school zone increased the likelihood of violent crime, which in turn disrupted interstate commerce by reducing the willingness of individuals to travel interstate to those areas that are perceived to be unsafe. Furthermore, the Government asserted that the presence of firearms in a school zone threatened the educational process, thereby causing a less productive national economy. The Court repudiated these arguments on the basis that to accept them would leave no activity beyond Congress' reach, a result antithetical to the notion that the federal government is one of limited power. *See id.* at 564-68, 115 S.Ct. at 1632-34. Once again stressing the importance of limited federal powers in the constitutional scheme, the Court explained that the uncertainty arising from the need to determine whether a given activity is commercial or noncommercial was not a sufficient reason to abandon the principles of federalism upon which our nation was founded. *See id.* at 566, 115 S.Ct. at 1633. Therefore, accepting that no "precise formulation" was available, the Court concluded that the guiding principles pointed the way to a correct decision with regard to § 922(q): "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567, 115 S.Ct. at 1634.

The question of the constitutionality of FACE in light of *Lopez* has provoked widespread debate. *See, e.g.*, Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 Case W. Res. L.Rev. 801, 839-43 (1996) (noting that *Lopez* was a counterpoint to the trend of expanding Commerce Clause authority, but that its principal legacy "may be its symbolic value"); Deborah Jones Merritt, *Commerce!*, 94 Mich. L.Rev. 674, 724-26 (1995) (predicting that courts will continue to find that FACE is constitutional post-*Lopez*); Benjamin W. Roberson, *Abortion as Commerce: The Impact of United States*

v. Lopez on Freedom of Access to Clinic Entrances Act of 1994, 50 Vand. L.Rev. 239, 254-68 (1997) (opining that FACE is unconstitutional in light of *Lopez*); Steven A. Delchin, Note, *Viewing the Constitutionality of the Access Act Through the Lens of Federalism*, 47 Case W. Res. L.Rev. 553, 624 (1997) (maintaining that FACE, "as an exercise of the commerce power, is clearly a congressional overreaching of power" (footnote omitted)); Lan Hoang, Note, *Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248: The Controversy Behind the Remedy*, 20 Seton Hall Legis. J. 128, 166 (1996) (noting that recent Supreme Court opinions, including *Lopez*, "may be indicative of a potential reassessment of FACE"); Anna Kampourakis & Robin C. Tarr, Note, *About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light* of *Lopez*, 11 St. John's J. Legal Comment. 191, 214 (1995) (noting that "[g]iven the recent conservative trend of the Supreme Court ... the prospects for FACE's survival are not bright"); John M. Scheib, Note, *Cheffer v. Reno: Is the Regulation of Abortion Clinic Protests the Regulation of Interstate Commerce?*, 41 Vill. L.Rev. 867, 898-906 (1996) (criticizing the decision in *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995), for having ignored critical aspects of *Lopez*). There is by no means a general consensus as to whether *Lopez* should be viewed as an epochal decision revolutionizing Commerce Clause jurisprudence as Justice Souter forewarned in his dissenting opinion, *see Lopez*, 514 U.S. at 614-15, 115 S.Ct. at 1656-57 (Souter, J., dissenting), or whether it merely clarifies the outer limit to Congress' commerce power. What is clear, however, is that we cannot say that the result reached in *American Life League* is no longer tenable in light of *Lopez*.

The *Lopez* Court made clear that its holding that Congress had exceeded its commerce authority in enacting § 922(q) was driven by a concern for maintaining a constitutionally appropriate federal-state balance of powers by interpreting the Commerce Clause in a manner that would not grant Congress a general police power. *See Lopez*, 514 U.S. at 552-53, 564-68, 115 S.Ct. at 1626-27, 1632-34; *see also id.* at 568-83, 115 S.Ct. at 1634-42 (Kennedy, J., concurring); *id.* at 584-602, 115

S.Ct. at 1642-51 (Thomas, J., concurring). Indeed, the *Lopez* decision both begins and ends its analysis with reference to the necessity of construing Congress' commerce power so that a federal government of enumerated, limited powers is preserved. *See id.* at 552-53, 564-68, 115 S.Ct. at 1626-27, 1632-34. The Court recognized that some line must be drawn to separate that which is truly national, and therefore is subject to congressional regulation, from that which is truly local, and therefore is not. *See id.* at 567-68, 115 S.Ct. at 1633-34. Although stressing that the question of where that line is to be drawn necessarily is a complex one, the Court emphasized several keys in its analysis.

The Court repeatedly pointed to a distinction between the regulation of, on the one hand, those activities that are commercial or economic in nature--or arise out of or are connected with a commercial transaction--and, on the other hand, those activities that are not. In the two instances in which it stated the controlling analysis, the Court focused on the fact that the possession of a gun in a school zone was neither itself an economic or commercial activity nor had any connection with such activity. *See id.* at 561, 115 S.Ct. at 1630-31 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."); *id.* at 567, 115 S.Ct. at 1634 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). Further, *Lopez* characterized its prior Commerce Clause decisions, including *Wickard*, *Heart of Atlanta Motel*, *McClung*, *Perez*, and *Hodel*, as upholding congressional enactments that regulated economic activities or activities that arose out of or were connected with commercial transactions. *See id.* at 559-60, 115 S.Ct. at 1629-30. And, in referring to the process of determining the outer limit of Congress' commerce power the Court referred to the necessity of deciding "whether an intrastate activity is commercial or noncommercial." *Id.* at 566, 115 S.Ct. at 1633. Finally, the Court considered important whether the

regulation would intrude into an area traditionally within the sovereign power of the states or whether the subject of the regulation was one ordinarily or especially of federal concern. *See Id.* at 561 n. 3, 563-64, 115 S.Ct. at 1631 n.3, 1631-32; *id.* at 580, 115 S.Ct. at 1640 (Kennedy, J., concurring) (noting that in assessing whether Congress has exceeded its commerce power, a court "must inquire whether the exercise of national power *seeks* to intrude upon an area of traditional state concern").

Here, the activity regulated by FACE, while not itself economic or commercial, is closely and directly connected with an economic activity; therefore, unlike the possession of a gun in a school zone prohibited by § 922(q), we cannot conclude that FACE "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561, 115 S.Ct. at 1630-31. FACE does not regulate the provision of reproductive health care. Rather, it regulates the use of force, threat of force, or physical obstruction to intentionally injure, intimidate, or interfere with persons because they are or have been obtaining or providing reproductive health care services. Although this regulated activity is not itself commercial or economic in nature, it is closely connected with, and has a direct and profound effect on, the interstate commercial market in reproductive health care services. As the congressional reports accompanying FACE make clear, several aspects of interstate commerce are directly and substantially affected by the regulated conduct.[7] These reports indicate that many

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[7]Of course, as the *Lopez* Court recognized, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557 n. 2, 115 S.Ct. at 1629 n. 2 (internal quotation marks omitted). And, whether a specified activity affects interstate commerce in a manner sufficient to provide constitutional authority under the Commerce Clause is a matter for independent judicial determination. *See id.* In short, the presence of legislative findings,

women travel across state lines to obtain reproductive health care, that facilities providing these services retain staff in an interstate employment market and utilize supplies obtained through interstate commerce, and that some reproductive health care facilities that had been the targets of the activities regulated by FACE had been forced to discontinue the provision of services. *See* H.R.Rep. No. 103-306, at 6-10 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, 703-07; H.R. Conf. Rep. No. 103-488, at 7-8 (1994), *reprinted in* 1994 U.S.C.C.A.N. 724, 724- 25. The real and substantial connection between the conduct regulated by FACE and the interstate commercial market in reproductive health care services dictates that we need not "pile inference upon inference" to find a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 567, 115 S.Ct. at 1634. Accordingly, FACE does not suffer from the fundamental defect underlying the Gun-Free School Zones Act of 1990: Acceptance of the proposition that Congress possesses the authority under the Commerce Clause to regulate the activity at issue in FACE will not effectively remove all limitations on Congress' commerce power. Therefore, unlike § 922(q), FACE may be upheld under the line of Supreme Court authority "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561, 115 S.Ct. at 1631. Because FACE regulates an activity that has a close connection with commercial activity and has a substantial effect on interstate commerce, we conclude that Congress possesses authority under the Commerce Clause to enact it,[8] and we

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though helpful in assisting the court in performing its review, cannot sustain a regulation that exceeds constitutional authority. Here, as we held in *American Life League*, the congressional findings "are more than ample to justify Congress's invocation of the commerce power." *American Life League*, 47 F.3d at 647.

[8]We note that all of the other circuit courts of appeals that have considered the constitutionality of FACE under the Commerce Clause in the wake of *Lopez* uniformly have held that the statute

thus agree with the United States that we are bound by our prior decision in *American Life League.*[9]

IV. *First Amendment Challenge to FACE*

The United States next maintains that the district court erred in concluding that FACE is unconstitutional under the First Amendment. Although the district court correctly noted that several of Plaintiffs' First Amendment challenges were not directly foreclosed by *American Life League,* it nevertheless held that FACE violates the First Amendment in several respects. We disagree.

The district court first concluded that FACE was unconstitutional because its prohibition on intimidation that "creates a 'reasonable apprehension of bodily harm to him- or herself or another' " impermissibly "hinges on the subjective reaction that speech elicits from its listener." *See Hoffman,* 923 F.Supp. at 822 (quoting 18 U.S.C.A. § 248(e)(3) (West Supp.1997)). The district court also determined that FACE was unconstitutionally overbroad because by prohibiting speech that "creates a reasonable apprehension of bodily harm

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passes constitutional muster. *See Terry v. Reno,* 101 F.3d 1412, 1415-18 (D.C.Cir.1996), *cert. denied,* — U.S. ----, 117 S.Ct. 2431, 138 L.Ed.2d 193 (1997); *United States v. Dinwiddie,* 76 F.3d 913, 919-21 (8th Cir.), *cert. denied,* — U.S. ----, 117 S.Ct. 613, 136 L.Ed.2d 538 (1996); *United States v. Wilson,* 73 F.3d 675, 679-88 (7th Cir.1995), *cert. denied,* — U.S. ----, 117 S.Ct. 46, 136 L.Ed.2d 12 *and* — U.S. ----, 117 S.Ct. 47, 136 L.Ed.2d 12 (1996); *Cheffer v. Reno,* 55 F.3d 1517, 1519- 21 (11th Cir.1995).

[9]Because we conclude that Congress possesses the authority to enact FACE as an activity substantially affecting interstate commerce, we need not reach the alternative arguments of the United States that Congress possessed authority to enact FACE as a measure for the protection of persons or things in interstate commerce under the second category of Commerce Clause powers or under § 5 of the Fourteenth Amendment.

... it reaches beyond the restriction of fighting words[and] imminent threats of lawless action that is permitted by the First Amendment." *Id.* (internal quotation marks omitted). Finally, the district court held that FACE was overbroad because it reaches "speech [that] threatens bodily harm to another." *Id.* This reasoning, however, is misdirected.

The plain language of FACE prohibits only conduct that by force or physical obstruction injures, interferes with, or intimidates the provider or recipient of reproductive health care or speech that amounts to a threat of force that obstructs, injures, intimidates, or interferes with the provider or recipient of reproductive health care. The regulation of neither the former conduct, nor the latter speech, is violative of the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 484, 113 S.Ct. 2194, 2199, 124 L.Ed.2d 436 (1993) ("[A] physical assault is not ... expressive conduct protected by the First Amendment."); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388, 112 S.Ct. 2538, 2546, 120 L.Ed.2d 305 (1992) (noting that "threats of violence are outside the First Amendment"); *New York v. Ferber*, 458 U.S. 747, 769-73, 102 S.Ct. 3348, 3361-63, 73 L.Ed.2d 1113 (1982) (holding that a statute must burden a substantial amount of protected speech to be unconstitutionally overbroad); *Cameron v. Johnson*, 390 U.S. 611, 616-17, 88 S.Ct. 1335, 1338-39, 20 L.Ed.2d 182 (1968) (upholding statute criminalizing conduct that "obstructs or unreasonably interferes with ingress or egress to and from" public buildings against First Amendment vagueness and overbreadth challenges); *American Life League*, 47 F.3d at 648-53 (concluding that FACE is viewpoint neutral and is neither vague nor overbroad); *see also Terry v. Reno*, 101 F.3d 1412, 1418-22 (D.C.Cir.1996) (rejecting First Amendment challenge to FACE), *cert. denied*, --- U.S. ----, 117 S.Ct. 2431, 138 L.Ed.2d 193 (1997); *United States v. Soderna*, 82 F.3d 1370, 1374-77 (7th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 507, 136 L.Ed.2d 398 (1996); *United States v. Dinwiddie*, 76 F.3d 913, 921-24 (8th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 613, 136 L.Ed.2d 538 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1521-22 (11th Cir.1995) (same).

V. *Conclusion*

In sum, we hold that N.C. Gen.Stat. § 14-277.4 is not unconstitutionally overbroad or vague on its face, and North Carolina properly may enforce its provisions. Further, we hold that Congress acted within its authority under the Commerce Clause in enacting FACE and that the statute does not violate the First Amendment. Consequently, we reverse the judgment of the district court.

REVERSED.

APPENDIX B

Sharon Hoffman, Trudie Matthews, Diane Hoefling, Rev. Ronnie Wallace, and Rev. John Bradley,
Plaintiffs,
v.
James B. HUNT, and The State of North Carolina,
Defendants,
The United States of America, Intervenor.

No. 3:93-CV-393-P.

United States District Court,
W.D. North Carolina,
Charlotte Division.

April 1, 1996.

As Amended April 17, 1996.

ROBERT D. POTTER, Senior District Judge.

THIS MATTER is before the Court on Plaintiffs' Complaint, filed December 6, 1993, praying for a Declaratory Judgment, a temporary restraining order, and a preliminary injunction (document # 1).

I. PROCEDURAL BACKGROUND

The Plaintiffs' Complaint challenged the constitutionality of N.C.G.S. § 14-277.4, a statute which criminalizes certain forms of civil protest at health care facilities.

On December 29, 1993, Defendants filed Motions to Dismiss for Plaintiff's lack of standing, failure to state a claim,

lack of subject matter jurisdiction, and alternatively, to abstain (document # 11). After oral argument was had on January 14, 1994, the Court in *Hoffman v. Hunt*, 845 F.Supp. 340 (W.D.N.C.1994), denied the Plaintiffs' application for a temporary restraining order and preliminary injunction. The Court determined that declaratory relief was more appropriate than preliminary injunction because it involved the most minimal intrusion possible into the State's constitutionally recognized province of enforcing the criminal law, and ordered Defendants to file their answers, which they did on March 4, 1994 (document # 19). The Court, in that Order, also denied the State Defendants' Rule 12(b)(6) Motions, and preliminarily found the statute overbroad and vague. The Court further found that the Plaintiffs had constitutional standing and stated a claim. The Court found that Section 14-277.4 has a deterrent effect on Plaintiffs' free exercise of their First Amendment rights produced by fear of prosecution for violating the statute. The Court further found that the Plaintiffs have a personal stake in this action because they are persons who wish to freely protest abortions and educate others to their views. The Court further held that the Plaintiffs suffered actual harm because of a credible threat of prosecution. Plaintiffs' complaint makes clear they would be conducting the First Amendment activity but for the genuine threat of enforcement of the disputed state statute by asserting their own rights to free speech. The Court declined to abstain because there is ambiguity of state law that gives rise to injuries of constitutional proportions and because the Court should rule so as to alleviate any concern about the Plaintiffs' infringement of state law.

On May 26, 1994, the President of the United States signed into law the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), Pub.L. No. 103- 259, 108 Stat. 694, codified as 18 U.S.C. § 248. Section 248(c)(3) of that Act authorized action by the State Attorney General in the name of the State.

Consequently, on June 15, 1994, Plaintiffs moved for leave to file an amended complaint to add a new cause of action

challenging the constitutionality of FACE because of the additional fear from the threat of enforcement of FACE by Defendant State of North Carolina and the Attorney General of the United States (See Motion to Amend (document # 31) and Amended Complaint (document # 35) and Michael Matthews' Affidavit (document # 68)). Leave was granted by this Court on July 13, 1994 (document # 34) and the amended complaint was filed July 19, 1994 (document # 35). The Plaintiffs' Motion for Preliminary Injunction was filed July 28, 1994 (document # 36) and will be ruled on in this Order.

On August 10, 1994, the State Defendants filed a "Motion to Hold Plaintiffs' Motion for Injunctive Relief in Abeyance" (document # 47) pending resolution of the issues in *American Life League, et al. v. Reno, et al.* which at that time was pending before the Fourth Circuit Court of Appeals. (That case was decided by the Fourth Circuit on February 13, 1995, and is reported at 47 F.3d 642 (4th Cir.1995)). The petition for *certiorari* was denied by the Supreme Court on October 2, 1995.

On August 25, 1994, the United States of America filed a Motion to Intervene and a Motion to Stay ruling on Preliminary Injunction pending decision in *American Life League, et al. v. Reno* (document # 49). On October 5, 1994 this Court granted the United States' Motion to Intervene as a defendant (document # 55), and on November 29, 1994 this Court filed an Order granting the United States' Motion to Stay Plaintiffs' Motion for Preliminary Injunction pending resolution of *American Life League, et al. v. Reno* (document # 60). The Order granting the Motion to Stay was vacated by Order filed October 17, 1995, and the parties were directed to file briefs by November 17, 1995 as to the effect, if any, of the decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) upon Congress' authority to enact FACE on the grounds that it rationally concluded that the regulated activity affects interstate commerce (document # 70).

On March 6, 1995, the State Defendants moved to dismiss the Plaintiffs' Complaint regarding FACE and for summary judgment in their favor regarding N.C.G.S. § 14-277.4 pursuant to Rule 56 of the Federal Rules of Civil Procedure (document # 61). An evidentiary hearing was held as to the State statute on February 2, 1996.

The matters now before the Court and to be decided in this Order are:

1. Declaratory Judgment as to the constitutionality of N.C.G.S. § 14- 277.4;

2. Declaratory Judgment as to the constitutionality of 18 U.S.C. § 248;

3. The outstanding Motion (document # 61-1) by the State Defendants to Dismiss the Plaintiffs' Complaint as to FACE and the State Defendants' Motion for Summary Judgment (document # 61-2) in their favor as to N.C.G.S. § 14- 277.4;

4. Motion by the United States (document # 72) to Dismiss the claim in Plaintiffs' amended complaint challenging the constitutionality of 18 U.S.C. § 248; and

5. Plaintiffs' prayer for a permanent injunction against enforcement of N.C.G.S. § 14-277.4 and 18 U.S.C. § 248.

The Court notes that the Plaintiffs filed affidavits to support their position, but the Defendants did not file any affidavits or produce any evidence at the evidentiary hearing. Because the Court has not excluded Plaintiffs' affidavits and has held an evidentiary hearing, the Court will consider the Plaintiffs' affidavits and the evidence produced by the Plaintiffs at the evidentiary hearing and will treat the Motion to Dismiss as a Motion for Summary Judgment, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This Court will dispose of the Motion as provided in Rule 56.

In this Court's opinion in *Hoffman v. Hunt*, 845 F.Supp. 340 (W.D.N.C.1994) the Court denied the State Defendants' Motion to Dismiss for failure to state a claim under Rule 12(b)(6) and found that the complaint stated a claim for a first amendment overbreadth challenge sufficient to overcome a motion to dismiss. The Court also preliminarily found the statute sufficiently vague to overcome a motion to dismiss for failure to state a claim and consequently denied that motion, as well as the Defendants' motions to abstain and to dismiss for lack of subject matter jurisdiction. In the same opinion the Court denied Plaintiffs' application for a temporary restraining order and a preliminary injunction and ordered the Defendants to file their answer as required by Rule 12(a) of the Federal Rules of Civil Procedure.

II. NORTH CAROLINA GENERAL STATUTE SECTION 14-277.4

A. *The Evidence of Application of N.C.G.S. § 14-277.4.*

The undisputed evidence of this case shows that Plaintiffs Sharon Hoffman, Trudie Matthews, Diane Hoefling, the Rev. Ronnie Wallace, and the Reverend John Bradley are opposed to abortion for religious, moral, and scientific reasons.[1] By reason of that opposition, the Plaintiffs have frequently exercised their First Amendment right to protest in front of health care facilities that perform abortions. During these protests, police officers for the City of Charlotte have relied upon North Carolina's law governing the obstruction of health care facilities to regulate the Plaintiffs' activities as set forth

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[1]On February 2, 1996, this Court held an evidentiary hearing to take evidence concerning the application of North Carolina's statute to the protest activities at issue. At that hearing, the State entered no evidence, and did not contest the testimony of the Plaintiffs concerning the application of North Carolina's law.

below.

The Plaintiffs' affidavits describe how picketers have been threatened with arrest. Michael Matthews affirms that on February 11, 1995, he was threatened with arrest for distributing literature at an abortion clinic because the police officer on duty interpreted the state statute as prohibiting those activities. He further affirms that on March 18, 1995 he was advised by police officers picketers could not preach or counsel while there was pro-life picketing occurring, and that to avoid arrest the picketers were required to put down their picket signs while others continued to preach and counsel. (See pp. 1 & 2 of Matthews Aff.) (document # 68).

The affidavits describe confusion about the meaning of the statute among the police. Karen Graham's affidavit (document # 67) affirms that she has personally been at the location of abortion facilities in the Charlotte- Mecklenburg area on approximately 15 different occasions and has encountered the Charlotte-Mecklenburg Police Department who are routinely called to the scene. She further affirms that there are four main abortion facilities in the Charlotte-Mecklenburg area, and that each one is in a different police district of the Charlotte-Mecklenburg Police Department ("CMPD"). It has been her experience that the interpretation and application of the North Carolina law prohibiting the obstruction of access to health clinics is different in each of the four police districts, that the officers in each of the four districts have a different interpretation of the meaning of the words "interfere," "delay," "impede," "obstruct," and "intimidate" depending on the particular sergeant on duty, that there are differences of interpretation within each individual police district, and that it is common for two or three police officers at the scene of a peaceful pro-life picket on public property outside an abortion facility to disagree among themselves on what expressive activities constitute "interference," "delay," "obstruction," "intimidation," or "impeding" under the statutes. She further affirms the police officers will "huddle" like referees in a football game and

debate among themselves on what expressive activities will be permitted that day under those words.

Graham's affidavit further says that sidewalks open for public use are adjacent to each of the four abortion facilities in Charlotte. Graham then elucidates a sampling of how various policemen interpret the statute differently concerning picketing on those sidewalks:

> a. Some police officers enforce the North Carolina statute by prohibiting picketers from walking on any portion of a public sidewalk crossed by a driveway to the clinic, even if no cars are in sight. She affirms that the police officers interpret the statute as requiring that all picketing occur either on one side or the other of a driveway, and that the mere act of a lone picketer traversing on a public sidewalk from one side to the other of the driveway constituted "interference," "delay," "impeding," and "obstructing." No actual impediment of vehicular or pedestrian traffic is required to have occurred.
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> b. Other police officers interpret the North Carolina statute as permitting crossing the driveway on the public walkway so long as the picketer does not actually block vehicular traffic, but that they change their mind from day to day or even on the same day.
>
> c. Some police officers interpret the North Carolina statute as permitting pro-life leafletters to stand on the public sidewalk to the side of the driveway and wave their literature to get the attention of persons in automobiles entering or exiting the driveway area, so long as the leafletter does not step in front of an automobile.
>
> d. Other police officers interpret the North Carolina statute as prohibiting standing on the public sidewalk to the side of the driveway and waving pro-life literature because if a car stopped so that the person inside could obtain the literature it would constitute interference

under the statute.

e. Another officer told the affiant that the only time she could hand out literature was after the automobile was parked in the clinic parking lot, and then advised the affiant that if she walked to the parked automobile she would be trespassing on abortion facility property.

f. On one occasion, a police sergeant pretended to draw an imaginary "line" on the sidewalk and stated that if the picketers crossed the "line," it would violate North Carolina law.

g. On another day, police officers at the scene advised pro-life picketers who were also offering counseling that they could either picket or sidewalk counsel, but could not do both simultaneously under the North Carolina statute, as to do both would constitute "interference" under the North Carolina statute.

The affidavits describe how interpretation of the statute has been influenced by the opinion of clinic employees. Graham states that on Saturday, June 11, 1994, approximately 30 people arrived at 212 E. Morehead Street to picket and distribute literature at "Family Reproductive Health Clinic" which performs abortions. Graham affirms that while picketing they walked peacefully in a single file and crossed the driveway on the sidewalk, but never stood in front of a car. As a car pulled into the driveway they did not place any objects in front of the windshield but would lean toward a car if it slowed or stopped and allowed the passenger to hold out a hand and accept literature. Graham further affirms that after cars were in the parking lot a person in the pro-life group would use a megaphone to speak to them. The megaphone was not battery operated and did not electronically amplify sound. Graham affirms that Officer Helms told them they could not hand out literature at the driveway, but only in the clinic parking lot. After Graham questioned Officer Helms about coming into the parking lot,

the officer asked a Ms. Ross from the clinic if that would be okay and she said "no." Ms. Ross then told the officer that the statute prohibited protestors from handing out literature to women entering the clinic. As Ms. Ross put it, "All they can do is when the women drive in here [the clinic parking lot], I'll ask them if they want to talk [to the protestors] and if they do, then I'll tell them that they can go down there." After the police officer heard Ms. Ross' opinion as to the operation of North Carolina's statute, he turned to Ms. Graham and said, "Well, I guess that's all you can do is yell out at them." (Tr. p. 28, lines 19-25; p. 29, lines 1-14). Graham then told the officer they were going to attempt to hand out the literature peacefully and that they understood they would be arrested. Officer Helms then called her supervisor, Sgt. Neal, who stated that picketers crossing the driveway on the sidewalk was a violation of the North Carolina statute because it blocked the driveway. Sgt. Neal also complained about people handing out literature on the sidewalk next to the driveway, and he stated that if a car stopped, the picketers would be in violation of North Carolina law because the car would be blocking the driveway. Later the officers told the picketers that they could not cross the driveway, but had to divide into two groups, one on each side of the driveway (Graham Aff. document # 67). Graham also informed Sgt. Neal that the picketers would continue to hand out literature and as long as they did not stand in the car's path or force literature on anyone who did not want it and that they would offer literature to any car that slowed or stopped.

On November 7, 1995, the Court set an evidentiary hearing for January 8, 1996 to hear testimony and take any other relevant evidence concerning the Defendants' application of N.C.G.S. § 14-277.4 to protest activities of the Plaintiffs. (Doc. # 71). Because of adverse weather conditions the hearing was rescheduled to February 2, 1996. At the hearing the Plaintiffs offered Karen Graham, Diana Hoefling, Reverend Ronnie Wallace, and Michael Alan Matthews, and Trudie Matthews, all of whom testified in substance that they were opposed to abortion and that the picketing of

abortion clinics had as its purpose to talk to women who are seeking abortion and to convince them not to participate in that procedure through persuasion by showing them literature, pictures and through discussion.

All of the witnesses testified that they had never engaged in violence or threats of violence to achieve the goals of delaying a person from having an abortion or changing the mind of someone seeking an abortion (Tr. p. 9, lines 12-17; p. 42, lines 12-14; p. 58, lines 3-7; p. 79, lines 4-25; p. 80, lines 1-7).

All of the witnesses testified that they had experienced difficulty in having the police define exactly what was and what was not a violation of the statute. Likewise, all of the witnesses recounted examples where the personnel of clinics providing abortions had goaded the police into changing their interpretation of the statute. (Tr. p. 24, lines 16-25; p. 25, lines 1-6; p. 28, lines 22-25; p. 29, lines 1-14; p. 45, lines 1-9; p. 61, lines 3-16). For example, Ms. Graham testified:

> A. Well, there are occasions when police officers say that handing out that literature is in violation of the statute. There was even one occasion when a woman police officer came to the scene, and she talked to the abortion clinic administrator, then came and talked to me and said that there were people who were coming into the clinic for other reasons than abortions, and they were there to have abortions, which is perfectly legal, and that just our presence there was causing them to call in and say that the were going to delay their appointments, and, therefore, that was in violation of the statute and she had every right to arrest me just for that.

(Tr. p. 15, line 25; p. 16; lines 1-12). Police officers told Karen Graham that if a car stops to receive literature then they would be delayed and that would be in violation of the statute. (Tr. p. 18, lines 3-9). Police drew imaginary lines on

the public sidewalk and told Graham that she would have to stand behind the line and could not cross it to hand literature to a car which had stopped in the driveway crossing the sidewalk to get the literature to the car. (Tr. p. 19, lines 10-21).

On June 11, 1994, after the Clinic Administrator complained to the police that the demonstrators should have been arrested because they had violated the statute, the police stopped three of them, took their telephone numbers and where they worked and told them a warrant may be issued for their arrest. (Tr. pp. 24-25). All of the witnesses testified that as a result of this threat they spent the ensuing weeks in constant fear of arrest and repeatedly called the Police Department to try and learn if they were going to be prosecuted. When Ms. Graham called the Police Department to find out if she would be prosecuted, she was told that the police were still trying to decide if the protestors had violated the statute. (Tr. p. 24, lines 16-25; p. 25, lines 1-17).

On the following Saturday, a police officer told the protestors that if they violated the statute he would have them arrested. When Graham asked what his interpretation of the statute was so that she would know how not to violate it, the officer responded that she would know when he arrested her. When she told the officer that every officer who came out told her something different and asked him to tell her what she could do not to be arrested, he said "you can stay home." (Tr. p. 25, lines 18-25; p. 26, lines 3-22).

There were occasions when clinic "escorts" physically blocked Ms. Graham on public property from handing out leaflets to persons who indicated they wanted to receive them. (Tr. p. 30, lines 2-6). Ms. Graham testified that every time she went out to an abortion clinic she was threatened with arrest and was told most of the time she couldn't hand out her literature and couldn't persuade people not to have an abortion. (Tr. p. 35, lines 17-25).

Ms. Diane Hoefling testified that the goal of her expressive activities was to delay women going into an abortion clinic so that she could "get them to realize their child is alive and that abortion is killing." (Tr. p. 44, lines 2-8).

The Reverend Ronnie Wallace testified that he was opposed to abortion and was categorically opposed to violence or threats of violence to carry out those goals which were to persuade people entering a facility to delay or change their minds about destroying a child. (Tr. pp. 57-58). According to Wallace, the enforcement of the statute depends upon the content of the message he preaches outside of the clinics and the degree to which clinic personnel goad the police. He testified that when he preaches against abortion in general moral terms clinic personnel don't really object and there is no real problem. But when he speaks out about the racist and genocidal motives behind abortion or the malpractice record of the doctor performing the abortions, clinic personnel "go ballistic" and call the police. On several occasions police told Wallace that he could not preach on the sidewalk, but instead, he had to keep moving. Wallace was forced to keep parading back and forth of the clinic with one police officer in front of him and one police officer behind him. (Tr. p. 61, lines 3-25). The police told Wallace that by preaching he was interfering with people driving into the clinic and that kneeling to pray on the grassy knoll between the street and the sidewalk was "escalating the situation." (Tr. pp. 63-64). Wallace was forced to keep parading back in forth of the clinic with one police officer in front of him and one police officer behind him.

The witnesses testified that they opposed abortion on moral and religious grounds. Michael Alan Matthews testified that he believed "abortion is the taking of a human life and that it is an abomination to God." (Tr. p. 69). Trudie Matthews testified abortion is murder and the killing of unborn babies. (Tr. p. 88, lines 1-5).

The witnesses testified to a real fear of arrest. One Sgt.

Whitt Neal of the Charlotte Police Department on one occasion told the police officers that he had enough handcuffs for all of them and to line them up and he would arrest them. (Tr. p. 85). Graham testified as to the effect this had on the group as follows:

> A: Well, the group that remained there, we thought for sure that we were going to be arrested, and at that time, I started pleading with Sergeant Neal. I said, "Please don't arrest us, we didn't come here to get arrested." He said, "You came here to test the law, and that's what we're going to do here, you pick the ones you want arrested, I'll just get you arrested." And I said, "No, sir, we don't want to be arrested, we came out here just to distribute our literature, please let us clear this up, let me call the captain on Monday morning, please don't arrest us." And he finally had conversation with some of the other officers and decided not to arrest us but just take the names of the three of us.

(Tr. p. 85, lines 16-25; p. 86, lines 1-13).

There is no evidence that any of the protestors, including the Plaintiffs, in any way engaged in anything more than speech which did not involve threats, force, obstruction, or physical impediment. Rather, the evidence reveals mere leafletting to impede and interfere with abortion through peaceful persuasion. (Matthews Aff. ¶ 2, Graham Aff. ¶ 3, Tr. p. 9, lines 12-14; p. 44, lines 1-12; p. 57, lines 7-25; p. 28, lines 1-7; p. 42, lines 12-14).

The Plaintiffs are aware that Congress has enacted a federal statute that regulates their protest activities. They fear that the federal statute makes them liable for criminal and civil prosecution and damages because of their protest activities because they have been threatened with arrest under the statute. (Graham Aff. ¶ 5; Matthews Aff. ¶¶ 2, 4).

The Court finds the evidence produced by the Plaintiffs

to be true and unrefuted, since the Defendants have not filed any affidavits nor produced any witnesses to contradict the affidavits or testimony.

B. *Findings of Fact.*

Based on the affidavits filed by the Plaintiffs and the testimony provided at the evidentiary hearing on February 2, 1996, the Court makes the following findings of facts:

1. The Plaintiffs are citizens who believe abortion is the taking of innocent human life, the sacrifice of human life, killing, or the taking of human life (Tr. p. 6, lines 18-20; p. 44, lines 2-8; p. 57, lines 5-6; p. 69, lines 16- 17; p. 88, lines 1-5; p. 42, lines 5-11).

2. The Plaintiffs and other protestors have engaged in leafletting, picketing in accordance with city ordinances, sidewalk counseling and other non-violent activities to persuade women going into an abortion clinic so that they could get them to realize their child is alive and that abortion is killing (Tr. p. 6, lines 16-20; p. 17, lines 21-25; p. 18, lines 1-16; p. 42, lines 5-11; p. 88, lines 1-5).

3. The ultimate goal of the Plaintiffs is to end abortion in the United States by peacefully persuading women to seek alternatives to abortion such as adoption and to persuade physicians to discontinue the practice of abortion (Tr. p. 43, line 25; p. 44, lines 2-8).

4. Police have interpreted the statute in different ways and have difficulty deciding the meaning of the words "interfere", "obstruct", "impede", and "delay" (Tr. p. 23, lines 3-25; p. 24, lines 1-4; p. 45, lines 2-24; p. 14, lines 1-25; p. 15, line 1; p. 73, lines 1-25; p. 74, lines 1-2; p. 18, lines 1-25; p. 19, lines 1-25; p. 20, lines 1-25; p. 21, lines 1-25; p. 22, lines 1-14; p. 44, lines 15-25; p. 45, lines 1-25; p. 46, lines 1-25; p. 25, lines 23-25; p. 26, lines 1-22; p. 28, lines 19-25; p. 29, lines 1-25; p. 30, lines

1-6; p. 77, lines 19-22).

5. The Plaintiffs have attempted to have police define for them exactly what they may and may not do in order to comply with the statute, but have received varying interpretations from police officers (Tr. p. 13, lines 15-25; p. 14, lines 1-11; p. 35, lines 16-25; p. 65, lines 10-19).

6. There are different interpretations in different police districts and among police in the same district. For example, some police officers have told picketers they may not walk on the public sidewalk which crosses a driveway into the clinic, and have drawn imaginary lines on the sidewalk on each side of the driveway into the clinic and told the Plaintiffs they may not cross those lines and proceed on the sidewalk across the driveway, even if no cars are in sight. Other officers allow the picketers to cross the driveway so long as they do not block an approaching vehicle from passing. Some officers prohibit the handing out of leaflets to occupants of automobiles entering the clinic because that will impede traffic and constitute interference under the statute. Some officers allow the picketers to wave pro-life literature to get the attention of persons entering the driveway. Others do not. Some officers allow the leafletters to yell to people in the parking lot, others don't. If the leafletters walk into the parking lot with literature some officers hold that to be trespassing. (See Reference to Finding of Fact 5).

7. The Plaintiffs are aware that their conduct is regulated by the state and federal laws they have challenged but fear that those statutes will subject them to criminal and civil prosecution and liability for damages. The continued threats of arrest have had a chilling effect on the Plaintiffs' desire to continue their activities and have intimidated them from continuing the exercise of the First Amendment right to protest (Tr. p. 24, lines 16-20; p. 25, lines 1-17; p. 63, lines 1-25; p. 55, lines 4-13; p. 73, lines

14-19; p. 53, lines 11-19; p. 89, lines 20-25; p. 90, lines 1-16).

8. Officers are often persuaded by abortion clinic personnel to change their minds on some pronouncement they have made (Tr. p. 65, lines 10-19; p. 18, lines 20-25; p. 19, line 1; p. 15, lines 18-25; p. 16, lines 1-23; p. 21, lines 2-11; p. 24, lines 16-25; p. 25, lines 1-5; p. 28, lines 19-25; p. 29, lines 1-16).

9. None of the Plaintiffs have been a party to any form of violence or participated in any "sit in" since the enactment of the Statute (Tr. p. 42, lines 12-14; p. 58, lines 3-7; p. 68, lines 5-13; p. 79, lines 10-25; p. 80, lines 1-7; p. 89, lines 10-15).

10. The Plaintiffs and other protestors have stopped picketing often because of threats of arrest while lawfully picketing and leafletting. (Tr. p. 35, lines 11-25; p. 36, lines 1-2; p. 48, lines 1-18; p. 51, lines 3-20; p. 53, lines 11-19; p. 55, lines 1-13; p. 63, lines 3-25; p. 76, lines 21-25; p. 77, lines 1-2; p. 78, lines 21-25; p. 79, lines 1-25; p. 80, lines 1-7; p. 89, lines 16-25; p. 90, lines 1-16).

11. None of the protestors, including the Plaintiffs, have in any way engaged in anything more than speech which did not involve threats, force or obstruction or physical impediment, but did interfere with abortion patients through peaceful persuasion (Tr. p. 9, lines 12-22; p. 37, lines 21-25; p. 38, lines 1-23; p. 42, lines 12-25; p. 43, lines 1-4; p. 50, lines 18-24; p. 58, lines 3-7; p. 79, lines 10-25; p. 80, lines 1-7).

12. Because of the activities described above, the Plaintiffs brought suit alleging that the North Carolina's statute prohibiting obstruction of access to health care facilities, N.C.G.S. § 14-277.4, violated their First Amendment right to peacefully protest abortion both on its face and as

applied to their protest activities. While the suit was pending, Congress passed the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, so the Plaintiffs requested leave to amend their complaint and leave was given. In their amended complaint, the Plaintiffs alleged that Congress had no authority to regulate their protest activity under the Commerce Clause or the Fourteenth Amendment, and further that FACE violated their First Amendment right to free speech. The Plaintiffs seek declaratory and injunctive relief barring the application of both statutes.

C. *Conclusions of Law.*

1. *Defendants' Motion for Summary Judgment.*

The Defendants have moved for summary judgment on Plaintiffs' claims.[2] Summary judgment is appropriate when the pleadings, responses to discovery, and the record reveal that no genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *See* Rule 56(c) of the Federal Rules of Civil Procedure. The party

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[2]The Defendants filed a Motion to Dismiss and Motion for Summary Judgment on March 6, 1995. The Plaintiffs filed a Memorandum in Opposition to Defendants' Motion on April 27, 1995. The Court notes that the Plaintiffs filed affidavits to support their position, but the Defendants have not filed any affidavits. In addition, the Court has held an evidentiary hearing on this matter at which the Plaintiffs put on evidence concerning the operation of N.C.G.S. § 14-277.4. Again the Defendants offered no evidence in rebuttal. The Court will consider the Plaintiffs' affidavits and other evidence for the purposes of resolving the motions before the Court. Because both sides had an opportunity to offer evidence, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and dispose of it as provided in Rule 56 of the Federal Rules of Civil Procedure

moving for summary judgment has the initial burden of showing that no genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). After the moving party has met its burden, the non-moving party must come forward with specific facts showing that evidence exists to support its claims and that a genuine issue for trial exists. *Id.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *see* F.R.Civ.P. 56(e) (in response to motion for summary judgment, "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). When considering motions for summary judgment, courts must view facts and inferences in the light most favorable to the party opposing the motion for summary judgment. *Matsushita*, 475 U.S. at 587-88, 106 S.Ct. at 1356; *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). When, however, the evidence from the entire record could not lead a rational fact-finder to find for the non-moving party, no genuine issue for trial exists and summary judgment is appropriate. *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356. In this case, the Plaintiffs have offered evidence by way of affidavit and testimony, but the Defendants have offered no evidence in support of their Motion for Summary Judgment. Therefore, there is no genuine dispute of material fact that precludes the final disposition of the Defendants' Motion, and that Motion will be denied.

2. *Plaintiffs' Motion for Declaratory Relief from N.C.G.S. § 14-277.4.*

The Plaintiffs argue that N.C.G.S. § 14-277.4 is vague and overbroad such that it chills and unconstitutionally limits their First Amendment right to peacefully protest abortion. In this Court's opinion in *Hoffman v. Hunt*, 845 F.Supp. 340

(W.D.N.C.1994), the Court denied Defendants' Motion to Dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and found that the complaint stated a claim for a First Amendment overbreadth challenge sufficient to overcome a motion to dismiss. The Court also preliminarily found the statute sufficiently vague to overcome a motion to dismiss for failure to state a claim and consequently denied that motion, as well as the Defendants' motions to abstain, and to dismiss for lack of subject matter jurisdiction. In the same opinion, the Court denied Plaintiffs' application for a temporary restraining order and a preliminary injunction and ordered the Defendants to file their answer as required by Rule 12(a) of the Federal Rules of Civil Procedure. This matter is now before the Court on Defendants' motion for summary judgment. Defendants have not produced any evidence or argument that addresses the concerns initially raised by the Court. In fact, the very fears of vagueness and overbreadth which the Defendants once characterized as speculative have been confirmed in disturbing detail by the unrebutted evidence in this case. Therefore, this Court confirms its prior ruling as to the vagueness and overbreadth of the statute with the additions set forth below.

The First Amendment of the United States Constitution provides:

> Amendment I
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

These First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the State. *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963).

North Carolina General Statute Sections 14-277.4(a) and (e) provide as follows:

> § 14-277.4. Obstruction of health care facilities.
>
> (a) No person shall obstruct or block another person's access to or egress from a health care facility or from the common areas of the real property upon which the facility is located in a manner that deprives or delays the person from obtaining or providing health care services in the facility.
>
> ....
>
> (e) This section shall not prohibit any person from engaging in lawful speech or picketing which does not impede or deny another person's access to health care services or to a health care facility or interfere with the delivery of health care services within a health care facility.

Id. Several of the terms in this statute are vague, particularly as applied. Moreover, the language does not restrict its application to only those instances where the obstruction or blocking of another person's access to or egress from a health care facility, or deprivation or delay of a person from obtaining or providing health care is by force or violence or by physical obstruction. Nor does the statute provide for criminal penalties only against those who *intentionally* injure, intimidate or interfere with or attempt to injure, intimidate or interfere with any person or deprive or delay the person from obtaining or providing health care services in the facility. Instead, the statute as written and as applied reaches and goes beyond physical violence or intentional conduct and applies to speech protected by the First and Fourteenth Amendments.

The protection against vague and overbroad statutes is an essential attribute of the constitutional protection afforded speech and expressive conduct by the Constitution for, as the Supreme Court explained in *Grayned v. City of Rockford*,

408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked.' " (footnotes omitted).

Id. at 108-09, 92 S.Ct. at 2298-99.

The Tenth Circuit in *U.S. v. Protex Industries, Inc.*, 874 F.2d 740 (10th Cir.1989) elaborated on this point:

> Although a statute's meaning may be plain on its face, it can be rendered unconstitutionally vague as applied. The void for vagueness doctrine finds its basis in the guarantee of due process. In *Connally v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926), the United States Supreme Court elaborated on the void for vagueness doctrine. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their

> part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391, 46 S.Ct. at 127. A statute can be void for vagueness not only on its face, but as applied, as a result of "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964). Whether a court is analyzing a statute as void for vagueness on its face or as applied, the essence of the doctrine is that a potential defendant must have some notice or "fair warning" that the conduct contemplated is forbidden by the criminal law.

Id. at 743. These principles inform the Court's reading of North Carolina's statute.

(a) *N.C.G.S. §§ 14-277(a) and (e) are Vague.*

The Court finds that North Carolina's statute is unconstitutionally vague.[3] As has been demonstrated by the Plaintiffs' affidavits, documents # 67 and # 68, filed April 27, 1995, and evidence presented at the evidentiary hearing on February 2, 1996, the police do not understand what the terms of the statute mean and how it should be enforced.

For instance:
(1) the police have interpreted traversing a driveway across

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[3]"Vague" is an adjective which is defined as "not clearly grasped in the mind, not precise in expression, not firmly determined, hazy, not clearly perceived, not clearly formulating or expressing ideas." *Webster's Dictionary of the English Language* 1085 (2d ed. 1989).

a public sidewalk as constituting "interference" "delay" "impeding" and "obstructing";
(2) police told a minister that "preaching" was interfering with people driving into the clinic;
(3) kneeling on a grassy knoll between the sidewalk and street was "escalating the situation"; and
(4) officers disagree among themselves as to the meaning of the statute.

Even the State's attorney in oral argument on January 14, 1994 on Plaintiffs' Motions for a Temporary Restraining Order and Preliminary Injunction, when asked why subsection (e) was necessary if subsection (a) was so clear, replied that it was possible for a person to engage in speech "so obstreperous" that it would impede access to a health care facility. She then added that she could not imagine this provision would apply to speech unless "someone really crosses the line." When is speech so "obstreperous" that it really crosses the line? Who is going to define the line and say where it is? Apparently the police can't locate it. When one of the picketers tried to have the police define what the statute means so she would know how not to violate it, the only answer from the police was that she would know when they arrested her. (Tr. p. 26, lines 3-22).

The Court finds no reason to believe that the officers charged with enforcing this statute were of less than ordinary intelligence. As a result, the Court concludes that the evidence in this case clearly establishes that *first* a person of ordinary intelligence is not given a reasonable notice concerning what protest activity is prohibited so that he or she can act accordingly; *second* the statute does not provide explicit standards for those who apply them so as to prevent arbitrary and discriminatory enforcement and application; and *third* the statute operates to inhibit the exercise of First Amendment freedoms.

(b) *The Statute is Overbroad.*

The Court also finds that the statute is overbroad. The language of the statute does not restrict its application to those instances where the obstruction or blocking of another person's access to or egress from a health care facility, or deprivation or delay of a person from obtaining or providing health care is by force or violence or by physical obstruction. Nor does the statute provide for criminal penalties against anyone who *intentionally* injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person or deprive or delay the person from obtaining or providing health care services in the facility. Non-violent and totally voluntary picketing may cause a disruption of the economic activity of an abortion clinic, (euphemistically termed "reproductive health service,") but such activity and the consequences thereof must be weighed against the never changing constant of strong national commitment to the principal that "debate on public issues should be uninhibited, robust and wide open." See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686. The statute as written and as applied reaches and goes beyond physical violence and applies to speech protected by the First and Fourteenth Amendments.

The Defendants claim that the statute is necessary because "citizens of this State have been confronted by protestors in various blockades and 'rescues' at health care facilities, and have been required to force their way through hostile crowds of people to gain entrance to these facilities." (See pp. 21-23 Memorandum of Law on behalf of State Defendants in Support of Motion to Dismiss and Motion for Summary Judgment filed March 6, 1995). The Court assumes that the Defendants have a legitimate interest in prohibiting the activities they describe, but notes that legislative intervention can find constitutional justification only by dealing with the abuse. The First Amendment rights of Plaintiffs such as those before the Court cannot be curtailed as a result of efforts to address illegal conduct. As the Supreme Court said of First

Amendment rights long ago:

> These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.... If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

De Jonge v. Oregon, 299 U.S. 353, 364-365, 57 S.Ct. 255, 259-260, 81 L.Ed. 278 (1936). In this case, North Carolina's statute is not limited to the regulation of activities unprotected by the First Amendment, and therefore, that statute is unconstitutionally overbroad.

By reason of the evidence concerning the statute's application set forth above, the Court also finds that the North Carolina's statute is unconstitutional as applied for the end result of that statute's vagueness has been the very sort of arbitrary and overbroad application the vagueness and overbreadth doctrines are designed to prevent. There is no doubt that the statute has been enforced--at least in Charlotte, North Carolina--in an arbitrary way that has violated the First Amendment rights of the Plaintiffs and chilled those rights.

III. UNITED STATES CODE TITLE 18, SECTION 248

A. *Plaintiffs' Prayer for Declaratory Relief and Permanent Injunction.*

1. *The Statute.*

While this case was pending, Congress enacted the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 ("FACE"). The Act provides, in relevant part:

(a) Prohibited Activities.--Whoever--

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at the minor.

18 U.S.C. § 248. The stated purpose of the act was "to protect and promote the public safety and health and activities affecting interstate commerce...." *See* 18 U.S.C. § 248, statutory note, setting forth Section 2 of Pub.L. 103-259 (the statement of purpose).

The Plaintiffs believed that FACE threatened their First Amendment Right to protest abortion, and therefore, sought leave of this Court to amend their complaint so they might challenge the statute. This Court granted their request. In their amended complaint, the Plaintiffs have advanced several challenges to the federal statute that now governs their protest activities. Relying on the Supreme Court's recent decision in *U.S. v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Plaintiffs contend that Congress has no authority to regulate their protest under the Commerce Clause. They also assert that the Fourteenth Amendment provides no basis for the regulation of their purely private actions. In addition,

the Plaintiffs argue that even if Congress has the authority to regulate their protest activity, the statute Congress enacted violates their First Amendment rights.

The Defendants disagree. According to the Defendants, this case is governed by the Fourth's Circuit's opinion in *American Life League v. Reno*, 47 F.3d 642 (4th Cir.1995), which indicates that Congress has authority to enact FACE under the commerce power, and further, that the statute does not violate the First Amendment. The Defendants also assert that Congress had authority to enact FACE pursuant to Section 5 of the Fourteenth Amendment.

2. *The Constitutional Authority Relied Upon by Congress.*

Congress based its constitutional authority to enact FACE on two independent sources of constitutional authority, the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution, and Section 5 of the Fourteenth Amendment. So the starting point for this Court's analysis is the language of those constitutional provisions. Article I, Section 8, Clause 3 of the Constitution provides that "[t]he Congress shall have power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...." *Id.* Sections 1 and 5 of the Fourteenth Amendment provide:

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Id. The Court will address Congress' authority under the Commerce Clause first and return to the Fourteenth Amendment argument later in this opinion.

(a) *Commerce Clause Challenge.*

The single straight-forward clause in Article I, Section 8, Clause 3, of the Constitution that "The Congress shall have the power to regulate Commerce with foreign nations, and among the several states and the Indian Tribes" has generated an inordinate number of judicial decisions because some courts fail to appreciate that our national government is one of limited and enumerated powers rather than an all powerful national government with jurisdiction to manage and regulate the general affairs of its citizens. As the Supreme Court pointed out in *Lopez*, Congress' authority pursuant to Art. I, § 8, cl. 3, while plenary within its sphere, is limited to the regulation of three broad categories of activity:

1. The use of channels of interstate commerce
2. Protection of the instrumentalities of interstate commerce or persons or things in interstate commerce even though the threat may come only from intrastate activities.
3. The regulation of those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at — - —, 115 S.Ct. at 1629-1630.[4] The Supreme

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[4]In his concurring opinion Justice Thomas points out that the Constitution does not support the proposition that Congress has authority over all activities that "substantially" affect interstate commerce and that the Framers could have drafted a constitution

Court also indicated that within the third category the Supreme Court's case law had not been clear whether the activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. The Court concluded that consistent with the great weight of the Court's case law that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce. *Id.* [5]

While Congress did make findings to support its determination that it had constitutional authority under the Commerce Clause to enact FACE, the Court believes these findings do not support Congress' conclusion that the abortion protest activity regulated by FACE "substantially affects" interstate commerce. One of Congress' findings is that FACE regulates a problem that is national in scope. The Senate Committee on Labor and Human Relations Report (S. Rep. No. 117, 103rd Cong. 1st Sess. 3 (1993)) states:

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that contained a "substantially affects" interstate commerce clause had that been their objective. *Id.* at ---, 115 S.Ct. at 1644.

[5]For this reason, the Court agrees with the Plaintiffs that *Lopez, supra,* represents new law which must inform the proper resolution of this case. In *Lopez,* the Supreme Court clarified that Congress can only regulate activity that substantially affects interstate commerce pursuant to Art. I § 8, cl. 3, although some earlier cases had seemed to indicate that Congress could regulate any activity that affected interstate commerce. In *American Life League, supra,* the Fourth Circuit applied the mere affects formulation of the Commerce Clause test and therefore concluded that "the commerce power permits Congress to regulate activities affecting reproductive health services." *Id.* at 647 (emphasis added). Neither this test nor the Commerce Clause holding in *American Life League, supra,* are viable after *Lopez*. In addition, the Court also finds that *Lopez,* clarifies several limitations on Congress' commerce power which further dictate that FACE is invalid for the reasons given in this opinion.

> the problem Congress is addressing is national in scope and exceeds the ability of a single state or local jurisdiction to solve. Under these principles, S. 636 falls easily within the commerce power.

Id. at 31. The Court believes it can be said without fear of contradiction, however, that breaking and entering of homes and businesses, rape, burglary, assault and even murder, among other crimes, are problems which are national in scope, and apparently exceed the ability of a single state or local jurisdiction to solve. Moreover, every crime against property or persons obviously affects interstate commerce to some minimal degree. The Congress' reasoning calls to mind the idiom that little fleas have littler fleas on their backs to bite them and littler fleas have littler fleas on their backs to bite them and so on *ad infinitum.* The Supreme Court rejected similar congressional reasoning in *Lopez,* where the Court held that Congress did not have authority to enact 18 U.S.C. § 922(q):

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See *supra,* at 1629. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, *cf. Gibbons v. Ogden, supra,* [9 Wheat. 1,] at 195, [6 L.Ed. 23,] and that there never will be a distinction between what is truly national and what is truly local, *cf. Jones & Laughlin Steel, supra,* [301 U.S. 1,] at 30, 57 S.Ct. [615], at 621[, 81 L.Ed. 893]. This we are unwilling to do.

Lopez, 514 U.S. at ----, 115 S.Ct. at 1634. The Court finds this

case to be virtually identical to *Lopez*. The mere fact that Congress believes a problem is national in scope does not warrant ignoring the constitutional requirement that an activity must have a substantial effect on interstate commerce to justify the transformation of state law crimes into federal offenses in the absence of an independent constitutional basis for congressional authority.

Another of the legislative findings made in support of Congress' authority to enact FACE is that abortion clinics affect interstate commerce. The Senate Committee Report continues:

> Clinics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. No. 103-117, 103rd Cong., 1st Sess. 31 (1993). But it must be kept in mind that the regulatory target of FACE is the protest activity by the Plaintiffs, not the abortion clinic. In fact, the Senate Committee Report itself makes this clear when it describes the impact of the statute:

> Thus, for example, if an environmental group blocked passage to a hospital where abortions happen to be performed, but did so as part of a demonstration over harmful emissions produced by the facility, the demonstrators would not violate this Act (though their conduct might violate some other law, such as a local trespass law). In that example, the demonstrators' motive is related to the facility's emissions policy and practices and not to its policy and practices on abortion-related services. The Committee has concluded that inclusion of the motive elements is important to ensure that the

> Act is precisely targeted at the conduct that, as the Committee's record demonstrates, requires new Federal legislation: deliberate efforts to interfere with the delivery of abortion-related services.

Id. at 24. Here again the issue is whether the actions of those persons who engage in protests at an abortion clinic may be subject to criminal prosecution by the Federal Government under a statute enacted by Congress under the purported authority of the Commerce Clause of the U.S. Constitution, not whether Congress can regulate commerce.

Another category which the Report includes to justify the enactment of this law under the Commerce Clause is that patients travel in interstate commerce to seek abortion services. The Senate Committee Report continues:

> [M]any of the patients who seek services from these facilities engage in interstate commerce by traveling from one state to obtain services in another. In *Bray*, the Supreme Court accepted the district court's finding that substantial numbers of women travel interstate to seek abortion services. *Bray v. Alexandria Women's Health Clinic, supra*, [506 U.S. 263 at 274,] 113 S.Ct. 753 at 762[, 122 L.Ed.2d 34].

Id. at 31. The Senate Committee Report also states:

> Clinic employees sometimes travel across State lines to work as well. Like Dr. Gunn, the physician who was killed in Pensacola, Fl., some doctors who perform abortions work in facilities in more than one State.

Id. The Court is nonplussed to understand why the Committee cites *Bray*, however, for there is no contention that the protestors hinder in any way the interstate travel of women seeking abortions or that their protests are designed to interfere with their right to travel. In fact, *Bray* held that:

> [p]etitioners oppose abortion, and it is irrelevant to their opposition whether the abortion is performed after interstate travel.
>
> Respondents have failed to show a conspiracy to violate the right of interstate travel for yet another reason: Petitioners' proposed demonstrations would not implicate that right. The federal guarantee of interstate travel does not transform state-law torts into federal offenses when they are intentionally committed against interstate travelers. Rather, it protects interstate travelers against two sets of burdens: "the erection of actual barriers to interstate movement" and "being treated differently" from intrastate travelers. (Citations omitted). (Art. IV, § 2 "inhibits discriminating legislation" against [citizens of other states and] gives them the right of free ingress into other States, and egress from them) (citations omitted). (Art. IV, § 2 "insure[s] to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy"). As far as appears from this record, the only "actual barriers to movement" that would have resulted from Petitioner's proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another. Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them. That would not be the case here, as respondents conceded at oral argument.

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 276, 113 S.Ct. 753, 763, 122 L.Ed.2d 34 (1993). *Bray* shows that Congress cannot use the interstate movement of patients and staff to justify FACE.

The Senate Committee Report also asserts that the protest activity regulated by FACE affects interstate commerce. The Report continues:

> [A]s Attorney General Reno noted, the types of activities that would be prohibited by S. 636 have a negative effect on interstate commerce. As the record before the Committee demonstrates, clinics have been closed because of blockades and sabotage, and have been rendered unable to provide services. Abortion providers have been intimidated and frightened into ceasing to perform abortions. Clearly, the conduct prohibited by S. 636 results in the provision of fewer abortions and less interstate movement of people and goods. This situation is analogous to Congress's exercise of the commerce power in passing Title II of the Civil Rights Act of 1964, which was premised on the conclusion that restaurants that discriminated served fewer customers, and therefore suppressed interstate commerce. *See Heart of Atlanta Motel v. United States,* 379 U.S. 241[, 85 S.Ct. 348, 13 L.Ed.2d 258] (1964). Here, of course, the very purpose of those engaging in the conduct addressed by S. 636 is to suppress the provision of abortion services.
>
> Accordingly, the Committee concludes that Congress clearly has the authority to enact this law pursuant to the Commerce Clause.

S. Rep. No. 103-117, 103rd Cong., 1st Sess. 31-32 (1993). But, as explained further below, the notion that Congress can enact FACE because the activities of protestors result in fewer abortions as well as less interstate movement of people and goods is really straining at gnats. In fact, FACE is not aimed at the commercial activity of abortion clinics. It is aimed at the basic freedom of individuals to engage in civil protest.

House Report No. 103-306, 103rd Cong. 1st Sess. U.S. Code Cong. & Admin. News 1994 p. 699 attempts to justify the legislation by enumerating the reprehensible conduct of some of those who have engaged in violence to promote their views:

Need for Federal remedies to protect patients and providers of reproductive health services.

A nationwide campaign of blockades, invasions, vandalism, threats and other violence is barring access to facilities that provide reproductive health services, including services arising from the constitutionally protected right to choose. This dramatically escalating violence is endangering the lives and well-being of patients, providers, and their respective families. Seemingly frustrated by lack of success in courts, state legislatures and public opinion, certain factions within the pro-life movement have turned increasingly to violent means to stop clinics from operating, to prevent patients from gaining access to clinics, and to prevent doctors and other professionals from providing reproductive health care.

This campaign of violence has lead to death, injury, harassment, fear, and thousands of arrests all across the nation. It has resulted, as intended, in access to the constitutionally protected right to choose being denied to thousands of women nationwide against their wills. The record before the Committee establishes that state and local law enforcement is often inadequate (and sometimes unwilling) to handle this situation; that this is a problem of national proportion--incidents have occurred all across the nation, large-scale operations have been and are continuing to be organized on an inter-state basis, and women travel interstate to obtain reproductive health care services; and that Federal legislation is needed to put a stop to the violence and disorder and to restore access to constitutionally protected rights.

The activities to which H.R. 796 responds take many forms including blockades and invasions of clinics; violence and threats of violence against providers and their families; and vandalism and destruction of property at facilities. According to the National Abortion Federation, from 1977 to April 1993, more than 1000 acts

> of violence against providers of reproductive health services were reported in the United States. These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic "invasions," and one murder. In addition, over 6000 clinic blockades and other disruptions have been reported since 1977.

H.R. Rep. No. 103-306, 103rd Cong., 1st Sess. pp. 6-7 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, 703-04. The violent acts referred to in the Report, however, are not condoned by more than a relatively small number of pro-life protestors, and the legislation is not limited to these violent acts. Further, the Report indicates there have been thousands of arrests all over the nation by local law enforcement officials under existing statutes. The incidents of murder, assault, trespass, vandalism, blockades, violence and threats of violence, destruction of property, etc. cited by the Report are traditionally state crimes already addressed by existing state laws. As noted below, *Lopez* shows that congressional enactments that intrude into these areas are suspect, especially where, as here, the statute regulates activity that has no discernible relationship to interstate commerce. *See Lopez*, 514 U.S. at ---- - ----, 115 S.Ct. at 1631-33.

More importantly, in *Lopez*, the Supreme Court reaffirmed that congressional authority under Art. I, § 8, cl. 3, is limited to interstate commerce and activities that substantially affect interstate commerce. That principle is well established. In *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), the Supreme Court speaking through Mr. Justice Harlan cited Mr. Chief Justice Hughes in *Santa Cruz Fruit Packing Co.*, 303 U.S. at 466, 58 S.Ct. at 660:

> The subject of federal power is still "commerce," and not all commerce but commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of interstate commerce, but the "constitutional differentiation still obtains." *Santa*

Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453, 466, 58 S.Ct. 656, 660, 82 L.Ed. 954.

> The Court has ample power to prevent what the appellants purport to fear, "the utter destruction of the State as a sovereign political entity."

Id. at 196, 88 S.Ct. at 2024. The Court also explained that:

> [n]either here nor in *Wickard* (*Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122) has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

Id. n. 27.

This principle was recently reaffirmed in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), where the Court rejected the argument that Congress could regulate the interference with access to abortion clinics caused by abortion protestors because some individuals seeking abortions traveled interstate. There the Court wrote:

> Respondents, like the courts below, rely upon the right to interstate travel--which we have held to be, in at least some contexts, a right constitutionally protected against private interference, (citations omitted). But all that respondents can point to by way of connecting petitioners' actions with that particular right is the District Court's finding that "[s]ubstantial numbers of women seeking the services of [abortion] clinics in the Washington Metropolitan area travel interstate to reach the clinics." 726 F.Supp., at 1489. That is not enough. As we said in

a case involving 18 U.S.C. § 241, the criminal counterpart of § 1985(3):

> "[A] conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then ... the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought." (Citations omitted).

Id. at 274-275, 113 S.Ct. at 762. In short, the Supreme Court continues to recognize that when Congress acts pursuant to its commerce power, it must link its regulation to activities that have an explicit connection with interstate commerce. *See Lopez*, 514 U.S. at ---, 115 S.Ct. at 1631.

There are also important constitutional imperatives which indicate that Congress may not enact legislation which addresses areas traditionally left to the states thereby undermining the role of the states in our federal system. Justice Kennedy observed in his concurrence in *Lopez:*

> federalism was the unique contribution of the Framers to political science and political theory. (citations omitted). Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). (citations omitted). ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent

the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.... In the tension between federal and state power lies the promise of liberty"); New York v. United States, supra, [505 U.S. 144,] at 180, 112 S.Ct. [2408] at 2431[, 120 L.Ed.2d 120] ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power' ") (citations omitted).

* * * * * *

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the federal and state governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636, 112 S.Ct. 2169, 2178, 119 L.Ed.2d 410 (1992). Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. *See New York v. United States, supra*, at 154-163, 112 S.Ct., at 2417-2422; *FERC v. Mississippi*, 456 U.S. 742, 787, 102 S.Ct. 2126, 2152, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The resultant inability to hold either branch of the

government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

* * * * * *

For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. In the Webster-Hayne Debates, *see* The Great Speeches and Orations of Daniel Webster 227-272 (E. Whipple ed. 1879), and the debates over the Civil Rights Acts, see Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., pts. 1-3 (1963), some Congresses have accepted responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, *see Public Citizen v. Department of Justice*, 491 U.S. 440, 466, 109 S.Ct. 2558, 2572-2573, 105 L.Ed.2d 377 (1989); *Rostker v. Goldberg*, 453 U.S. 57, 64, 101 S.Ct. 2646, 2651, 69 L.Ed.2d 478 (1981), the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Lopez, 514 U.S. at ---- - ----, 115 S.Ct. at 1638-39.

Similarly, Justice Thomas points out in his concurring opinion that *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824) did not hold that whatever Congress believes is a national matter becomes an object of Federal control. Rather, *Gibbons* held that federal power does not encompass "commerce" that does not extend to an effect on other States.

> There is a much better interpretation of the "affect[s]" language: because the Court had earlier noted that the commerce power did not extend to wholly intrastate commerce, the Court was acknowledging that although the line between intrastate and interstate/foreign commerce would be difficult to draw, federal authority could not be construed to cover purely intrastate commerce. Commerce that did not affect another State could never be said to be commerce "among the several States."
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> * * * * * *
>
> The second source of confusion stems from the Court's praise for the Constitution's division of power between the States and the Federal Government:
>
> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id.* at 195.
>
> In this passage, the Court merely was making the well understood point that the Constitution commits matters of "national" concern to Congress and leaves "local" matters to the States. The Court was not saying that whatever Congress believes is a national matter becomes an object of federal control. The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization

> and bankruptcy, types of commerce, and so on. See generally, U.S. Const., Art. I, § 8. *Gibbons'* emphatic statements that Congress could not regulate many matters that affect commerce confirm that the Court did not read the Commerce Clause as granting Congress control over matters that "affect the States generally." *Gibbons* simply cannot be construed as the principal dissent would have it.

Lopez, 514 U.S. at ---- - ----, 115 S.Ct. at 1647-48. In short, this Court believes that Congress rested its authority to enact FACE on the very sorts of arguments rejected by the Supreme Court in *Lopez*.

Indeed, this case is almost identical to *Lopez, supra*, where the Supreme Court held that the Gun Free Schools Act of 1990, 18 U.S.C. § 922(q)(1)(A), exceeded the authority of Congress "[t]o regulate Commerce ... among the several States ..." provided in the U.S. Const., Art. I. § 8, cl. 3, because the statute regulated activity that did not "substantially affect" interstate commerce. *See Lopez*, 514 U.S. at ----, 115 S.Ct. at 1634. The Court gave two reasons for its holding. First, the Court found that § 922(q) was not within the scope of Congress' commerce power because the provision was not enacted pursuant to a larger regulation of economic activity and did not regulate a commercial activity which, when viewed in the aggregate, substantially affected interstate commerce. *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1630-31. Second, the Court also found that Congress had exceeded its commerce power when it enacted the Gun-Free School Zones Act because the statute lacked any jurisdictional element that would ensure, through a case-by-case inquiry, that the statute's reach was limited to that discrete part of the regulated activity that had an explicit connection with or effect on interstate commerce. *Id.* at ----, 115 S.Ct. at 1631.

This Court sees no significant distinction between FACE and the provision of the Gun-Free School Zones Act struck down by the Supreme Court in *Lopez*. In this case, the federal

statute purports to regulate the activity of persons who protest outside abortion clinics and here, as in *Lopez*, the regulated activity is not commerce or economic enterprise, however broadly one might define those terms. *See Lopez*, 514 U.S. at ----, 115 S.Ct. at 1631. Thus FACE, like § 922(q) of the Gun-Free Zones Act at issue in *Lopez*, cannot be sustained under cases upholding regulation of activities arising out of, or connected with, a commercial transaction which, when viewed in the aggregate, substantially affect interstate commerce. *Cf. Lopez*, 514 U.S. at ---- - ----, 115 S.Ct. at 1630-31. Similarly, even if Congress could properly regulate the Plaintiffs' protest activities and rationally conclude that those activities substantially affect interstate commerce, the statute does not contain an express jurisdictional element which would ensure, through case-by-case inquiry, that the noncommercial activity regulated by the statute has an explicit connection with or effect on interstate commerce. *See Lopez*, 514 U.S. at ----, 115 S.Ct. at 1631.

Despite the pronounced similarity of this case and *Lopez*, the Attorney General asserts that Congress had authority to enact FACE pursuant to its commerce power. According to the Attorney General, FACE comes well within the scope of congressional authority under the Commerce Clause because Congress rationally concluded that the conduct regulated by the statute had a substantial affect on interstate commerce or protects persons or things in interstate commerce. The Attorney General relies upon three congressional findings: 1) that some abortion patients and providers travel interstate; 2) that clinics performing abortions buy and sell goods and services in interstate commerce such that the protest activities regulated by FACE have a negative impact on the interstate commerce; and 3) that the problem posed by abortion protestors is national in scope. *See* S. Rep. No. 103-117, 103rd Cong., 1st Sess. (1993); H.R. Rep. No. 103-306 (1993); H.R. Conf. Rep. No. 103-488, 103rd Cong., 2d Sess., p. 7, *reprinted in* 1994 U.S.C.C.A.N. 724. According to the Attorney General, these congressional findings are entitled to considerable deference, and they indicate that Congress rationally

concluded that the activities regulated by FACE are well within the scope of authority conferred by the Commerce Clause.

This Court disagrees with the Attorney General. For one thing, this Court believes that Congress cannot regulate the protest activities of the Plaintiffs because those activities, like the gun possession at issue in *Lopez*, are simply not properly characterized as commercial or economic activities. FACE, like the provision at issue in *Lopez*, "is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms", and "[i]t cannot therefore be sustained under ... cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at ---- - ----, 115 S.Ct. at 1630-31.

Indeed, this Court believes that the Supreme Court's opinion in *Lopez* is significant precisely because it clarifies a limit upon Congress' commerce power that was implicit in Commerce Clause precedent but neglected until now. The *Lopez* Court made clear that congressional authority over those activities that substantially affect interstate commerce (the third category of activities described in *Lopez*) is limited to those activities that can fairly be characterized as commercial or economic. Otherwise, Congress could very well regulate such subjects as family law, day-care, education, and any other facet of our daily lives pursuant to its authority under Art. I, § 8, cl. 3, by simply finding that those activities substantially affect interstate commerce; for those activities surely do affect interstate commerce more than the protest activities at issue here. Such a result is the very reason why the Court held that Congress did not have authority to enact 18 U.S.C. § 922(q). It could not be otherwise because such an expansive view of the commerce power, if accepted, would transform Congress' authority "[t]o regulate Commerce ... among the several States ...", granted in Art. I, § 8, cl. 3, of the Constitution into "a plenary police power that would

authorize enactment of every type of legislation," *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1633. The effect of such a view would therefore eviscerate the limited government secured by the enumeration of federal powers contained in the Constitution.

The *Lopez* Court noted that "a determination of whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty." *Id.* But the Court believes this case is a fairly easy one. Here as in *Lopez*, the statute addresses an area of traditional state concern and neither the actors nor their conduct have an evident commercial character. Under these circumstances, the Court finds that Congress exceeded its power under Art. I., § 8, cl. 3, when it sought to regulate the protest activities of the Plaintiffs, because those activities are neither commerce or economic enterprise however broadly one might define those terms, and therefore, are not properly regulated by Congress pursuant to its authority "[t]o regulate Commerce ... among the several States...." Art. I, § 8, cl. 3.

In this regard, the Court disagrees with *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995) and *U.S. v. Wilson*, 73 F.3d 675 (7th Cir.1995), which reject this argument on the grounds that it finds no support in Commerce Clause precedent. *See Cheffer*, 55 F.3d at 1520 & n. 6; *Wilson*, 73 F.3d at 684- 85. By so doing those decisions ignore the Supreme Court's instruction that Congress' authority to regulate activities that substantially affect interstate commerce is limited to the regulation of commercial or economic activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1630-31. Both *Cheffer* and *Wilson* mistakenly rely on statutes that regulate activity which Congress could reasonably characterize as economic or commercial because the activity regulated by those statutes relates to commercial transactions or activities that have an apparent economic motive. These statutes, however, cannot support the conclusion in *Cheffer* and *Wilson* that Congress can regulate noncommercial or noneconomic activities consistent with *Lopez*. *See Cheffer*, 55 F.3d at 1520 & n. 6; *Wilson*, 73 F.3d at

684-85.

Even if Congress can regulate, consistent with *Lopez*, non-commercial or non-economic activity that substantially affects interstate commerce, however, the Court finds that Congress exceeded its authority under Art. I, § 8, cl. 3, when it enacted FACE. Even the most cursory examination of Congress' findings shows that they are plainly insufficient to support a reasonable inference that the protest activity regulated by the statute has a substantial effect upon interstate commerce. The Senate Report, which contains the best findings offered in support of the legislation, relies almost exclusively on anecdotal evidence concerning the effect of anti-abortion protest upon commerce. The only quantitative evidence concerning these protests states that there have been a total of 7,000 incidents where protestors have interfered with abortion-related commerce between 1977 and 1993. But this figure supports a mere showing that, on average, there has been approximately 8 incidents per year, per state, in which abortion protestors have interfered with abortion-related commerce. And there is really no significantly probative evidence showing the degree, if any, to which these activities have actually reduced abortion-related commerce. The Senate Report seeks to buttress the lack of evidence concerning the effects of these protest activities on interstate commerce by offering the conclusion that abortion protests have resulted in millions of dollars in property damage, millions of dollars in law enforcement costs, and have also caused some clinics providing abortions to be closed. *See* S. Rep. No. 103-117, 103rd Cong., 1st Sess. 5, 7, 31 (1993). These assertions are based on the incidents described in the committee reports, but again, there is absolutely no evidence concerning the actual or probable affects that these protest activities have on interstate commerce.[6]

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[6]The assertion regarding the costs of law enforcement activities is truly odd for law enforcement costs are not commerce no matter how broadly one might define that term. *See Lopez*, 514

In fact, none of the legislative materials provide any evidence which supports a reasonable inference that the regulated activities have a *substantial* effect upon interstate commerce. So, rather than muster the (nonexistent) congressional findings, the Attorney General repeatedly equates the interference that *local* protest might have upon *local* abortion-related commerce with a burden upon, or interference with, *interstate* commerce. In so doing, she relies heavily on those Commerce Clause cases which emphasize that the development of our national economy makes it most difficult to conclude that any given economic activity is truly "local" commerce in a narrow sense.

But the same process that has obliterated the barriers to national commerce and thereby created a truly national economy also accounts for the tremendous volume and value of that interstate commerce. Therefore, if it is difficult to conclude that any commerce is purely local then, by the same token, it is similarly difficult to conclude that any given activity has a truly substantial effect on interstate commerce. So even if one accepted the bare assertion that the protest activity regulated by FACE in the 1977-93 period created millions of dollars in property damage and closed some clinics that perform abortions (and the only evidence is that such closure was temporary), it clearly does not follow that the regulated activities have a substantial effect upon interstate commerce. Quite the contrary, it is evident that the activity Congress seeks to regulate in this case has--at most--an imperceptible effect on interstate commerce if only because during that same period interstate commerce, in the same broad sense

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U.S. at ---- - ----, 115 S.Ct. at 1630-31. More importantly, the Commerce Clause must be interpreted in light of its goal, to protect our national marketplace from barriers to interstate commerce, and therefore, only activity obstructing commerce--which is not the case with respect to conduct increasing law enforcement-related expenditures--is relevant to the Commerce Clause inquiry.

urged by the Attorney General, has dwarfed the relatively insignificant sums that can be reasonably inferred from Congress' findings.[7]

Under these circumstances, it is not surprising that the Attorney General has been unable to point to any congressional findings that would support a reasonable inference that the protest activities regulated by FACE has a *substantial* affect upon interstate commerce. Just this sort of modest inquiry concerning the effect that the activities regulated by Congress have on interstate commerce is essential precisely because "the question of congressional power under the Commerce Clause is necessarily one of degree." *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1633 (citations and quotations omitted). As the Supreme Court explained:

> There is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours is an elastic medium which transmits all tremors throughout its territory; *the only question is of their size.*

Id. (emphasis added, citations and quotations omitted). Because this view of causation is tenable in the abstract but inconsistent with the federal structure underlying the Constitution and its enumeration of powers, the Supreme Court has long recognized that the Constitution requires Congress' authority under Art I. § 8, cl. 3, be limited to the regulation of activity that *substantially* affects *interstate* commerce so that the Commerce Clause does not become the basis for a federal police power that would eviscerate the

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[7]During the same 1977-1993 period, for example, Gross Domestic Product has totaled approximately $61,244,600,000,000. *See Statistical Abstract of the United States*, Section 14, No. 699, 115th Ed. (1995).

limited government secured by the enumeration of federal powers. *See Lopez*, 514 U.S. at ----, 115 S.Ct. at 1633-34. Thus, when the Fifth Circuit noted that Congress can only regulate activity that substantially affects interstate commerce under Art. I, § 8, cl. 3, it explained:

> Indeed, it could not be otherwise as the chain of causation is virtually infinite, and hence there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place. Hence, if the reach of the commerce power to local activity that merely affects interstate commerce or its regulation is not understood as being limited by some concept such as 'substantially' affects, then, contrary to *Gibbons v. Ogden*, the scope of the Commerce Clause would be unlimited, it would extend " 'to every description' of commerce and there would be no 'exclusively internal commerce of a state' the existence of which the Commerce Clause itself 'presupposes' and the regulation of which it 'reserved for the state itself.' "

U.S. v. Lopez, 2 F.3d 1342, 1362 (5th Cir.1993), *aff'd* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).[8] In this case, even when Congress is given all due deference, its extremely limited findings are plainly insufficient to support a reasonable inference that the protest activities regulated by FACE substantially affect interstate commerce. At best, the congressional findings serve to establish a trivial or merely incidental impact that these protest activities have on interstate commerce, and "the Court has never declared that 'Congress may use a relatively trivial impact on commerce as an excuse

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[8]The ripple metaphor apparently references a pebble thrown in a tranquil pond, and the lesson of *Lopez*, when put in these terms, is that a given pebble (or human activity) must be fairly substantial before it can have a substantial affect upon the large and tumultuous pond that is our national marketplace.

for broad general regulation of state or private activities.'" *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1630 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n. 2, 88 S.Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020 (1968).).

The congressional findings cited in this case are little more than conclusions almost identical to the arguments offered by the government in *Lopez* to justify Congress' authority to enact the Gun-Free School Zones Act. Indeed this case bears a striking resemblance to Lopez precisely because it is necessary to pile inference upon inference in order to accept the Attorney General's argument that Congress' findings support a reasonable inference that the protest activity regulated by FACE has a substantial effect upon interstate commerce. If the findings and assertions relied upon by Congress and the Attorney General in this case pass constitutional muster, then Congress can regulate any activity under Art. I, § 8, cl. 3, so long as it bothers to make any findings of record at all. In fact, the Attorney General's effort to distinguish *Lopez* is unpersuasive because if Congress can regulate any activity that burdens abortion-related commerce, without a reasonable showing that such conduct substantially affects interstate commerce, then Congress can regulate any activity. *See Lopez*, 514 U.S. at ---- - ----, 115 S.Ct. at 1632-34.[9]

For these reasons, this Court cannot agree with *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995) or *U.S. v. Wilson*, 73 F.3d 675 (7th Cir.1995), which hold that Congress had authority to enact FACE because the statute regulates activities that

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[9]For example, if the Attorney General's argument were accepted, Congress could prohibit double-parking outside of abortion clinics, strike down laws restricting the hours during which supplies could be delivered to abortion clinics or the hours of their operation, and further, Congress could regulate any number of noncommercial activities that obstruct commerce such as trespass and shoplifting on the theory that such activities burden commerce.

substantially affect interstate commerce. The opinions are not persuasive because they contain no meaningful judicial review of Congress' findings, but rely on findings which show that the protest activities regulated by FACE have some relatively trivial effect on interstate commerce to satisfy the requirement that the regulated activities have a substantial effect upon interstate commerce. By eschewing any meaningful judicial inquiry concerning the degree to which the protest activity regulated by FACE affects interstate commerce these opinions ignore the Supreme Court's instruction that "the question of congressional power under the Commerce Clause is necessarily one of degree." *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1633 (citations and quotations omitted).

The Court realizes that judicial review of congressional action in this area is highly deferential, and that Congress need not act with scientific precision or make exhaustive findings when it decides to legislate in a given area. But it is also true that in *Lopez, supra*, the Supreme Court affirmed the traditional duty of Article III courts to determine whether a congressional enactment exceeds the scope of the commerce power and demonstrated that deferential judicial review cannot be equated with judicial obsequience. *See Lopez*, 514 U.S. at ---- & n. 2, ----, 115 S.Ct. at 1629 & n. 2, 1631; *see also* opinion of Kennedy, J. concurring, 514 U.S. at ---- & ----, 115 S.Ct. at 1637 & 1639; opinion of Thomas, J. concurring, 514 U.S. at ---- n. 9, 115 S.Ct. at 1650 n. 9. In this Court's view, *Lopez* illustrates that when Congress enacts a statute that regulates activity pursuant to its authority under Art. I, § 8, cl. 3, the existence of congressional findings to support the legislative judgment that the regulated activity substantially affects interstate commerce becomes especially important where, as here, no such substantial effect on interstate commerce is evident and where, as here, the arguments offered in support of congressional authority would, if accepted, transform the commerce power into a general police power. *See Lopez*, 514 U.S. at ----, 115 S.Ct. at 1634; *see also* opinion of Kennedy, J. concurring, 514 U.S. at ---- & ----, 115 S.Ct. at

1640 & 1642; opinion of Thomas, J. concurring, 514 U.S. at ----, ---- - ----, 115 S.Ct. at 1642, 1649-50. As noted earlier, Congress made no such findings when it enacted FACE.

Further, the statute is also void because FACE does not contain any jurisdictional element that limits its reach to activity that has an explicit connection with, or effect on, interstate commerce. *See Lopez*, 514 U.S. at ----, 115 S.Ct. at 1631.[10] So even if this Court were satisfied that Congress rationally concluded that the activity of the protestors was within the scope of its authority under Art. I, § 8, cl. 3, and substantially affected interstate commerce, the statute is void because it fails to contain a jurisdictional element which would ensure, through a case-by-case inquiry, that the statute only reached those activities that have the requisite connection with, or effect upon, interstate commerce. *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1631. As *Lopez* plainly indicates, where a federal statute regulates activity that has a substantial effect

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[10]The issue in *Lopez*, as framed by he Supreme Court, was whether the activity regulated by 18 U.S.C. § 922(q) could be upheld under Congress' authority to regulate activity that substantially affected interstate commerce. *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1630. After the Court concluded that § 922(q) could not be upheld because it did not regulate a commercial activity which, when viewed in the aggregate, substantially affected interstate commerce, *id.* at ----, 115 S.Ct. at 1630-31, it also found that Congress had exceeded its commerce power when it enacted the Gun-Free School Zones Act because the statute lacked any jurisdictional element that would ensure, through a case-by-case inquiry, that the statute's reach was limited to that discrete part of the regulated activity that had an explicit connection with or effect on interstate commerce. *Id.* Thus, *Lopez* indicates that where Congress can properly regulate activity on the theory that such activity substantially affects interstate commerce, then the statute must contain a jurisdictional element that limits the reach of the statute to those activities that have an explicit connection with or effect upon interstate commerce, id., such that they come within the scope of Congress' commerce power.

on interstate commerce, a jurisdictional element must "limit its reach to a discrete set of ... [regulated activities] that additionally have an explicit connection with or effect on interstate commerce." *Id.*[11] Absent such a jurisdictional element, a federal statute that properly reaches activity that substantially affects interstate commerce will also reach activity that has no such connection with interstate commerce, and therefore, is not properly within the scope of Congress' authority pursuant to Art. I. § 8, cl. 3. As the Supreme Court recognized in *Lopez*, such a result would transform Congress' authority to "regulate Commerce ... among the several States ..." U.S. Const., Art. I. § 8, cl. 3, into a federal police power--a result forbidden by the Constitution. *See Lopez*, 514 U.S. at ----, ---- - ----, 115 S.Ct. at 1631, 1633-34.[12]

The absence of a jurisdictional element that would limit the operation of FACE to "a discrete set of ... [protest activities] that additionally have an explicit connection with or effect on interstate commerce ..." *Lopez*, 514 U.S. at ---, 115 S.Ct. at 1631, is another reason why this Court cannot agree with the decisions in *Cheffer* and *Wilson*, supra. Those Courts ignore the holding in *Lopez*, that 18 U.S.C. § 922(q)(1)(A) was void because it did not have a jurisdictional element "which might

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[11]Thus, although the Attorney General correctly notes that "[w]here the class of activities is regulated and that class is within reach of federal power, the courts have no power 'to excise as trivial, individual instances' of the class ..." *Perez v. U.S.*, 402 at 154, 91 S.Ct. at 1361 (citations omitted). The Attorney General ignores the prior question treated in *Lopez, supra*, which indicates that a class of noneconomic activities is only within the reach of commerce power when it has an explicit connection with or effect on interstate commerce.

[12]For this reason, the Seventh Circuit properly recognized that Congress could not rest its authority to enact FACE on a finding that the problem caused by abortion protests was national in scope because, if it could, then Congress would have the equivalent of a federal police power. *See Wilson*, 73 F.3d at 683.

limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect upon interstate commerce." *Id.* Likewise, the Attorney General's reliance on various cases she cites is misplaced precisely because they either involve the regulation of commercial activity or statutes that have such a jurisdictional element linking the offense to interstate commerce.

Similarly, this Court also cannot accept the Attorney General's argument that FACE is a valid exercise of Congress' authority to "protect ... persons or things *in interstate commerce*." *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1629 (emphasis supplied). The statute is not focused, by its terms, on efforts to obstruct individuals from moving between states to secure or provide abortions. Rather, the statute regulates protest in the immediate vicinity of abortion clinics that may impede abortion-related traffic. So the Attorney General's argument is not persuasive. Indeed, as the Court has already noted, a similar argument was made and rejected in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), where the Supreme Court observed that purely intrastate restrictions do not implicate the right of interstate travel, *id.* at 274-75, 113 S.Ct. at 762-63, and the Seventh Circuit has properly rejected this argument, albeit *in dicta*. *See Wilson*, 73 F.3d at 686-87.

Nor can this Court accept the Attorney General's argument that FACE is a valid exercise of Congress' authority to "protect ... things *in interstate commerce*." *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1629 (emphasis supplied). The statute does not target the obstruction of interstate traffic in goods. And this Court cannot agree with the Seventh Circuit's reasoning, *in dicta*, that Congress could enact FACE pursuant to its authority to protect the movement of things in interstate commerce, *see Wilson*, 73 F.3d at 686-88. The Court believes that the Seventh Circuit's conclusion rests upon a misreading of *Lopez*, for when the Supreme Court held that § 922(q) did not fit within the second category of activity that Congress could regulate pursuant to Art I. § 8, cl. 3, it clearly indicated

that Congress' authority over activities in that second category derived from its authority to protect *instrumentalities* of interstate commerce or things *in interstate commerce*. *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1630 ("nor can § 922(q) be justified as a regulation by which Congress sought to protect an instrumentality of interstate commerce or a thing in interstate commerce."). In fact, the statute relied on by the Seventh Circuit for its broad reading of congressional authority to protect persons and things in interstate commerce does not support the Seventh Circuit's position; that provision concerns "... goods or chattels moving as or which are part of or which constitute an interstate or foreign shipment ..." 18 U.S.C. § 659. Thus the statute plainly relates to the movement of things in interstate commerce and the protection of instrumentalities of interstate commerce, i.e. the storage facilities, stations, stationhouses, platforms and depots noted by the Court. *See Wilson*, 73 F.3d at 687-88.

Again it could not be otherwise because if Congress' authority in this area is cut loose from its moorings--the regulation of instrumentalities of interstate commerce--then Congress can regulate any activity, see e.g. note 9 *supra.*, quite apart from whether that activity substantially affects interstate commerce; and for this same reason, no doubt, the Seventh Circuit properly rejected the Attorney General's argument that Congress had authority to protect persons in interstate commerce independent of Congress' authority to regulate the instrumentalities of interstate commerce. *Wilson*, 73 F.3d at 687. Finally, this broad reading of *Lopez* is also untenable because, as the Seventh Circuit recognized, it would require the Court to revive some sort of distinction between direct and indirect regulations of commerce, an approach that proved unworkable and was abandoned by the Supreme Court long ago. *See Wilson*, 73 F.3d at 688 (citing *N.L.R.B. v. Jones & Laughlin Steel, Inc.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937)). In short, the reasoning and result in *Lopez*, clearly indicate that the Attorney General's argument must be rejected.

Thus, Congress exceeded its power under Art. I., § 8, cl. 3, when it enacted a statute regulating protest activities which are not properly regulated by Congress pursuant to its authority "[t]o regulate Commerce ... among the several States...." Art. I, § 8, cl. 3, because they are neither commerce or economic enterprise however broadly one might define those terms. Congress also exceeded its power under Art I, § 8, cl. 3, when it sought to regulate the Plaintiffs' protest activities without making legislative findings that provide a rational basis for its conclusion that those activities regulated by the statute substantially affect interstate commerce. Finally, Congress violated the Constitution when it used its authority "[t]o regulate Commerce ... among the several States ..." Art I, § 8, cl. 3, U.S. Const., to enact a statute that did not include a jurisdictional element which would ensure, through a case-by-case inquiry, that the statute only reached those activities that have an explicit connection with, or effect on, interstate commerce such that they come within the scope of the commerce power. *See Lopez*, 514 U.S. at ----, 115 S.Ct. at 1631. Therefore, this Court finds that the current version of FACE is void.

But neither Congress nor the Attorney General need be alarmed. As *Lopez* indicates, under modern Commerce Clause jurisprudence Congress has enacted a wide variety of laws pursuant to its authority under Art. I, § 8, cl. 3, of the Constitution and the vast majority of those laws have been upheld precisely because the constitutional limits upon congressional power are modest and easily satisfied. Nothing in this decision, or in *Lopez*, implicates the wide range of activities that Congress has regulated via its commerce power and can still regulate consistent with *Lopez*.

(b) *Congressional authority to enact FACE pursuant to the Fourteenth Amendment.*

Turning to Congress' reliance on the Fourteenth Amendment, Section 1 of the Fourteenth Amendment provides:

Amendment XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

It would appear from the plain language of the Fourteenth Amendment that it applies only to State action. However, lawyers being the innovative characters they are have attempted in several cases to have the courts support their argument that the Fourteenth Amendment reaches private conduct. Even though some former justices of the Supreme Court have expressed the view that it might, the Supreme Court has never ruled that way.

One of the more recent cases reiterating the Supreme Court's holding is *Sherman v. Community Consol. School District 21*, 8 F.3d 1160 (7th Cir.1993), *cert. denied*, 511 U.S. 1110, 114 S.Ct. 2109, 128 L.Ed.2d 669;

> "[The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (citations omitted).

Id. at 1168. The Court pointed out that there were exceptions--a symbiotic relationship between a private actor and the State, an involvement of government authority, the state had commanded or encouraged the private discriminatory action by affirmatively supporting the private conduct challenged, or in private discriminatory action when the private actor carries on a traditional state function. Those persons who engage in picketing, leafletting and protesting against

abortion cannot under any stretch of the imagination be considered to be acting under the auspices of any State and certainly not pursuant to the laws of any State. Their conduct is purely private conduct and is not subject to the provisions of the Fourteenth Amendment.

(c) *First Amendment Challenges to FACE.*

As noted, the Plaintiffs also allege that FACE violates their First Amendment right to peacefully protest abortion and they have advanced a number of specific arguments in support of this claim. According to the Plaintiffs, the legislative history, statutory text, and operation of FACE show that it is a content- and view-point based restriction that violates the First Amendment because its purpose and effect is to restrain only anti-abortion protestors. They also argue that the statute is a content-based restriction violative of the First Amendment because it depends for its operation on the reaction of listeners to the speech of abortion protestors. In addition, the Plaintiffs argue that the statute is vague such that it violates the First Amendment because (1) the terms "force or threat of force" as used in § 248(a) might include a non-violent "sit-in", threatening someone or calling them a murderer, or warning someone that they may go to hell; (2) the term "physical obstruction" as defined in § 248(e)(4), might include requiring someone to walk through a picket line, walk around a persistent sidewalk counselor, step over people engaged in a "sit-in" or praying on the sidewalk, or wait twenty minutes while police arrest participants in a rescue blockade; (3) the term "bodily injury" as used in § 248(b) seems to include any emotional distress that might result from encountering abortion protestors and might include any medical complications arising from such an encounter; (4) the term "intimidates" defined by § 248(e)(3) to include a reasonable apprehension of bodily harm may include the emotional distress or medical complications noted above, and also, may be satisfied if an abortion provider believes that the delay or distress caused by encountering abortion protestors may threaten a woman who needs an abortion for

health reasons; (5) the term "interfere with" as defined by § 248(e)(2) to include "restrict[ing] a person's freedom of movement" may include the interference which accompanies circumventing those who kneel in prayer outside abortion clinics, crossing a picket line, or standing in someone's way to talk with them; and, (6) the statute is vague because its prohibition of "intimidation" depends on the subjective reaction of listeners to the speech of abortion protestors. In addition, the Plaintiffs claim that the statute is overbroad because, by its terms, it includes the obstruction or interference that is incidental to the exercise of their right to protest abortion by picketing, side-walk counseling, and prayer, activities that are properly protected under the First Amendment; and it prohibits threatening language that is neither "fighting words" nor an "imminent threat of lawless action" such that this threatening language is still protected by the First Amendment.

The Attorney General has not responded to these arguments. Instead, she notes that while this case was pending, the Fourth Circuit rendered its decision in *American Life League, supra.* According to the Attorney General, that intervening decision disposes of the Plaintiffs' First Amendment claims.

This Court agrees with the Attorney General in part. In fact, this Court stayed this case pending the Fourth Circuit's decision in *American Life League*, just so it would have the benefit of that intervening decision, and that decision does govern the resolution of several of the Plaintiffs' claims. More specifically, this Court believes that the Plaintiffs' claim that FACE violates the First Amendment because its purpose and effect is to limit the free speech of anti-abortion protestors because of their viewpoint must be rejected in light of the Fourth Circuit's decision. *See American Life League*, 47 F.3d at 648-51. The same is true of the Plaintiffs' claim that the statute's prohibition of physical obstruction is overbroad because it reaches the obstruction incidental to protected speech, *id.* at 652-53, and their claim that the statutory

prohibition of "interfering with" or rendering access to "unreasonably difficult" is vague or overbroad. *Id.* at 653.

However, this Court cannot agree with the Attorney General's assertion that the Fourth Circuit's decision disposes of the Plaintiffs' claims *in toto*. Implicitly, the Attorney General argues that when the Fourth Circuit resolved the First Amendment challenges brought in *American Life League, supra*, it resolved at once and for all time any possible First Amendment challenge that might be levied against the statute. This Court cannot agree because Article III limits the jurisdiction of federal courts to cases and controversies that are properly before the Court. Thus, federal courts do not review statutes in the abstract, vetting them for possible constitutional defects not raised by the parties to the case. Rather federal courts must and do limit themselves to the arguments properly raised by the parties. And it is evident that the Fourth Circuit's opinion only treats those issues raised in that case.

After reviewing the trial court record and appellate briefing and opinion in *American Life League, supra*, it is clear that the Fourth Circuit's opinion in that case does not dispose of several of the challenges raised by the Plaintiffs here. More specifically, nothing in the Fourth Circuit's opinion addresses the arguments made by the Plaintiffs in this case that the statute is a content-based restriction violative of the First Amendment because it depends for its operation on the reaction of listeners to the speech of abortion protestors. Nor does that opinion address their arguments that the statute is vague such that it violates the First Amendment because (1) the terms "force or threat of force" as used in § 248(a) might include a non-violent "sit-in", threatening someone or calling them a murderer, or warning someone that they may go to hell; (2) the term "bodily injury" as used in § 248(b) seems to include any emotional distress that might result from encountering abortion protestors and might include any medical complications arising from such an encounter; (3) the term "intimidates" defined by § 248(e)(3) to include a

reasonable apprehension of bodily harm may include the emotional distress or medical complications noted above, and also, may be satisfied if an abortion provider believes that the delay or distress caused by encountering abortion protestors may threaten a woman who needs an abortion for health reasons; (4) the prohibition of "intimidation" depends on the subjective reaction of listeners to the speech of abortion protestors. Similarly, the opinion does not address the Plaintiffs' argument that the statute is overbroad because it includes threatening language that is neither "fighting words" nor an "imminent threat of lawless action" such that this threatening language is still protected by the First Amendment.

Level of Scrutiny.

Having determined that some of the Plaintiffs' First Amendment challenges are not governed by the Fourth Circuit's prior decision in *American Life League*, the Court must determine the level of scrutiny that should be applied when reviewing FACE. The Plaintiffs have argued that heightened scrutiny is appropriate, and there is good reason to agree. As noted above, Congress specifically enacted FACE to deal with anti-abortion protestors, it does not deal with all protest activities outside of clinics providing abortions. In fact, the Senate Report itself makes this clear when it describes the impact of the statute:

> Thus, for example, if an environmental group blocked passage to a hospital where abortions happen to be performed, but did so as part of a demonstration over harmful emissions produced by the facility, the demonstrators would not violate this Act (though their conduct might violate some other law, such as a local trespass law). In that example, the demonstrators' motive is related to the facility's emissions policy and practices and not to its policy and practices on abortion-related services. The Committee has concluded that inclusion of the motive elements is important to ensure that the Act

> is precisely targeted at the conduct that, as the Committee's record demonstrates, requires new Federal legislation; deliberate efforts to interfere with the delivery of abortion-related services.

See S. Rep. No. 103-117, 103rd Cong., 1st Sess. 24 (1993). As the Senate Report emphasizes, FACE is designed to regulate the protest activities of only those protestors who are motivated by abortion, not individuals who may undertake the exact same conduct outside an abortion clinic for reasons not related to abortion.

Under these circumstances, it seems certain that FACE requires the heightened scrutiny applied by the Supreme Court in *Madsen v. Women's Health Center Inc.*, 512 U.S. 753, ----, 114 S.Ct. 2516, 2525, 129 L.Ed.2d 593 (1994), because FACE, like the content-neutral restriction at issue in *Madsen*, is not a generally applicable law, and therefore presents a distinct risk of censorship and discrimination. *Madsen*, 512 U.S. at ----, 114 S.Ct. at 2516. For as the Supreme Court noted in *Madsen*: "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* (brackets in the original, citation omitted). FACE circumvents that practical guarantee against unreasonable government, and therefore this Court is confident that the statute should be reviewed under the "more stringent" standard governing content-neutral restrictions on speech that are not generally applicable. See *Madsen*, 512 U.S. at ---- - ----, 114 S.Ct. at 2524-25. But the Fourth Circuit concluded otherwise in *American Life League*, supra, and this Court is bound by that decision.

Even under this deferential standard, however, several of the Plaintiffs' unopposed arguments are persuasive. First, by its plain terms FACE prohibits speech that is "intimidating" to someone because it creates a "reasonable apprehension of bodily harm to him- or herself or another", see 18 U.S.C. §

248(e)(3), such that the application of the statute hinges on the subjective reaction that speech elicits from its listener and is therefore unconstitutional. *See e.g. Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133, 112 S.Ct. 2395, 2403, 120 L.Ed.2d 101 (1992); *Texas v. Johnson*, 491 U.S. at 412, 109 S.Ct. at 2544; *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988). Also, by prohibiting speech because it creates a "reasonable apprehension of bodily harm to him- or herself or another", see 18 U.S.C. § 248(e)(3), it reaches beyond the restriction of "fighting words" nor "imminent threats of lawless action" that is permitted by the First Amendment so that the statute is overbroad and therefore unconstitutional. *See City of Houston v. Hill*, 482 U.S. 451, 461-62, 107 S.Ct. 2502, 2509-10, 96 L.Ed.2d 398 (1987); *Gooding v. Wilson*, 405 U.S. 518, 524, 92 S.Ct. 1103, 1106, 31 L.Ed.2d 408 (1972); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 927, 102 S.Ct. 3409, 3433, 73 L.Ed.2d 1215 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 449, 89 S.Ct. 1827, 1830, 23 L.Ed.2d 430 (1969); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971); *Cohen v. California*, 403 U.S. 15, 18-23, 91 S.Ct. 1780, 1784-87, 29 L.Ed.2d 284 (1971); *Watts v. U.S.*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*); *Wurtz v. Risley*, 719 F.2d 1438, 1439-42 & n. 2 (9th Cir.1983). Further, the Court finds that the statute is overbroad insofar as it allows individuals to sue for threats that allege harm to the speaker (such as a hunger strike) or allows third-parties to sue based upon their apprehension that speech threatens bodily harm to another; the Attorney General has mustered no case where such a statute has been found to satisfy the First Amendment, and the Court believes that this provision plainly reaches speech that cannot be regulated consistent with the Constitution. *Cf. Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505, 89 S.Ct. 733, 735, 21 L.Ed.2d 731 (1969). For these reasons, the Court finds that FACE violates the First Amendment such that the enforcement of these provisions must be enjoined.

NOW, THEREFORE, IT IS ORDERED:

1. The Motion by the Plaintiffs, filed December 6, 1993 (document # 1), for Declaratory Judgment declaring N.C.G.S. § 14-277.4 to be invalid and unconstitutional on its face is GRANTED.

2. The Motion by the Plaintiffs that Defendants be restrained from enforcing or threatening to enforce N.C.G.S. § 14-277.4 is GRANTED.

3. The Motion by Defendants James B. Hunt and the State of North Carolina to abstain from exercising any jurisdiction over this matter (document # 11) is DENIED.

4. The Motion by Defendants Hunt and the State of North Carolina to Dismiss and for Summary Judgment (document # 61) is DENIED.

5. The Motion by United States of America to Dismiss claim as to 18 U.S.C. § 248 (document # 72) is DENIED.

6. The Motion by Plaintiffs for Judgment declaring FACE, 18 U.S.C. § 248, unconstitutional (document # 76) is GRANTED.

7. Plaintiffs' prayer for Permanent Injunction enjoining enforcement of N.C.G.S. § 14-277.4 and 18 U.S.C. § 248 is GRANTED.

IT IS FURTHER ORDERED that the Clerk shall certify a copy of this Amended Memorandum of Decision and Order and a copy of the Amended Judgment to the counsel for the parties. The Clerk shall make the Amended Order and Judgment a part of the record on appeal from this Court's Judgment in lieu of the Order and Judgment filed April 1, 1996.

An Amended Judgment will be filed simultaneously with this Amended Memorandum of Decision and Order.

This the 17th day of April, 1996.

/s/ Robert D. Potter
ROBERT D. POTTER
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3: 93 CV 393 P

SHARON HOFFMAN, TRUDIE MATTHEWS, DIANE HOEFLING, REV. RONNIE WALLACE, and REV. JOHN BRADLEY, Plaintiffs,	)	
v.	)	AMENDED[1] JUDGMENT
JAMES B. HUNT, and STATE OF NORTH CAROLINA, Defendants,	)	
THE UNITED STATES OF AMERICA, Intervenor.	)	

(Filed April 17, 1996)

In accordance with the **Amended** Memorandum of Decision and Order filed simultaneously with this Judgment, **IT IS ORDERED, ADJUDGED AND DECREED:**

1. North Carolina General Statute Section 14-277.4 is invalid and unconstitutional.

2. The Defendants James B. Hunt and the State of North Carolina and its Attorney General are enjoined from enforcing N.C.G.S. § 14-277.4.

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[1]This judgment is the same as the Judgment filed April 1, 1996, except that the form of citations has been corrected.

3. 18 U.S.C. § 248 is invalid and unconstitutional.

4. The Defendant-Intervenor United States of America, the Attorney General of the United States, and the Attorney General of North Carolina are enjoined from enforcing 18 U.S.C. § 248, and from bringing any action either civil or criminal for any alleged violation of that statute.

This the 17th day of April, 1996.

/s/ Robert D. Potter
ROBERT D. POTTER
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

Sharon HOFFMAN, Trudie Matthews, Diane Hoefling, Rev. Ronnie Wallace, and Rev. John Bradley, Plaintiffs,
v.
James B. HUNT, The State of North Carolina, D.R. Stone, and The Charlotte-Mecklenburg Police Department, Defendants.

No. 3:93-CV-393-P.

United States District Court,
W.D. North Carolina,
Charlotte Division.

Feb. 22, 1994.

MEMORANDUM OF DECISION AND ORDER

ROBERT D. POTTER, District Judge.

THIS MATTER is before the Court on Plaintiffs' complaint praying for a Declaratory Judgment and Plaintiffs' motions for a temporary restraining order and a preliminary injunction, filed December 6, 1993. Also before the Court are Defendants' (Hunt and North Carolina; collectively, the State's) motions to dismiss for Plaintiffs' lack of standing, failure to state a claim, lack of subject matter jurisdiction, and alternatively, to abstain, filed December 29, 1993. On January 3, 1994, Defendants D.R. Stone (the Police Chief) and the Charlotte-Mecklenburg Police Department also filed motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, failure to state a claim, and alternatively, to abstain. The Court heard oral argument on these motions on January 14, 1994.

The Court has carefully reviewed the complaint, Plaintiffs' and Defendants' briefs, and the arguments

presented at the hearing. The Court has also undertaken a thorough review of the affidavits and other exhibits, as well as the applicable case law. Based upon the Court's review of this case at the present stage, the Court makes the following conclusions.

THE COMPLAINT

Plaintiffs are citizens who believe legalized abortion is murder. Because of their moral objections to abortion, Plaintiffs have engaged in, and hope to continue conducting, a broad array of remonstrative and informative activities outside abortion clinics. Plaintiffs' efforts outside the abortion clinics have taken on various forms such as "protest marches, leafletting, display of signs and placards, sidewalk counseling, organized picketing, writing and distributing literature, and engaging individuals in conversation about the abortion of human fetuses." Complaint ¶ 10, p. 4.

Plaintiffs believe N.C.G.S. § 14-277.4, a statute which criminalizes certain forms of civil protest, interferes with several of their constitutionally protected rights. Consequently, Plaintiffs brought this action under 42 U.S.C. § 1983 seeking a declaration by this Court that N.C.G.S. § 14-277.4 is unconstitutional and requesting injunctive relief so that they may continue their public dissent against legalized abortion without fear of criminal prosecution. N.C.G.S. § 14-277.4 provides in relevant part:

> (a) No person shall obstruct or block another person's access to or egress from a health care facility of from the common areas of the real property upon which the facility is located in a manner that deprives or delays the person from obtaining or providing health care services in the facility.
>
> (e) This section shall not prohibit any person from engaging in lawful speech or picketing which does not impede or deny another person's access to health care

services or to a health care facility or interfere with the delivery of health care services within a health care facility.

(h) Persons subject to the prohibitions in subsection (a) of this section do not include owners, officers, agents, or employees of the health care facility or law enforcement officers acting to protect real or personal property. N.C.G.S. § 14-277.4

Specifically, Plaintiffs believe this statute is unconstitutionally vague and overbroad in violation of the First Amendment's protection of free speech. Furthermore, they believe this statute violates the First Amendment's guarantees of freedom of assembly and religion. Plaintiffs also believe the statute denies them their Fourteenth Amendment right to equal protection of the law because it discriminates between classes of protestors. They also complain that the statute unconstitutionally delegates authority to police officers in violation of the Fourteenth Amendment's due process right, and that its criminal contempt provision deprives them of their rights to trial by jury, indictment, due process and equal protection.

ANALYSIS

The Court believes this action is in such an early stage that it poses certain problems in addressing the respective motions. Specifically, the Court notes that no answer has been filed and that the Court has before it two essential legal questions. First, the Court must decide whether Plaintiffs have standing to bring this action. Second, the Court must decide whether Plaintiff's complaint states a claim. Yet, in this case, to decide the first question requires the Court to resolve the second question. That is, Plaintiffs cannot be said to have suffered a justiciable injury in fact unless they are credibly faced with prosecution under a statute that is somehow unconstitutional. This Court believes that because of the scant record before it, it is premature for it to decide

the constitutionality of the statute in question and yet, to decide the other questions, there necessarily arises a need to decide the constitutionality issue.

Consequently, the Court will proceed to analyze the legal issues before it by only considering whether the complaint states a colorable constitutional infirmity in the statute, not whether the statute is now and forevermore unconstitutional.

1) *The Rule 12(b)(6) Motions*

Rule 12(b)(6) places the burden upon the party seeking dismissal to demonstrate the non-moving party has stated no facts in its complaint which entitle it to relief. In evaluating such a motion, the Court must assume all well plead facts are true and draw all reasonable inferences from those facts in favor of the non-moving party. *Miree v. DeKalb County*, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). Consequently, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 46, 78 S.Ct. 99, 101, 102, 2 L.Ed.2d 80 (1957).[1]

The Court finds Plaintiffs' complaint states, at the least, a colorable claim that § 14-277.4 is overbroad and vague. Having reached this conclusion, the Court does not believe it is necessary to consider the other maladies named in Plaintiffs' complaint since these findings alone are sufficient for the Court to evaluate the substantive aspects of this action

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[1]The Court finds that the Charlotte-Mecklenburg Police Department is not a person within the meaning of 42 U.S.C. § 1983. Accordingly, the Court grants its motion to dismiss for failure to state a claim upon which relief can be granted. *Vinson v. Richmond Police Dept.*, 567 F.2d 263 (4th Cir.1977). References to the Defendants in the remainder of this order does not include the Charlotte-Mecklenburg Police Department.

and still move on to evaluate the more immediate concerns presented by the jurisdictional motions to dismiss and the request for injunctive remedies.

a) *Overbreadth*

This statute prohibits persons from obstructing others exiting or entering a "health care facility" in a particular way. The statute provides that the prohibited "manner" of obstruction is that which "deprives or delays the person from obtaining or providing health care services in the facility." N.C.G.S. § 14-277.4(a). At first blush, this seems tolerable because the statute's reader assumes that blocking or obstructing can only occur by physical means. But the statute itself does not say this. Indeed, the statute focuses not on how the blockage or obstruction is conducted, but instead upon the effect which the blocker's or obstructor's actions have on the persons being blocked or obstructed. That is, this statute does not so much prohibit what the person facing criminal sanction does, as it makes criminal the effect of that persons' conduct on one seeking to enter or exit a health care facility. A person, as contemplated by this statute, can be both physically and psychologically obstructed, or delayed from entering a health care facility. Consequently, the statute appears to go beyond the physical aspects of blocking or obstructing which come to mind in the common usages of those words and invades that murky area where protected speech is implicated.

Statutes cannot survive a facial attack to their overbreadth if they are "susceptible of application to speech, ... that is ... protected by the First and Fourteenth Amendments." *Lewis v. City of New Orleans*, 415 U.S. 130, 134, 94 S.Ct. 970, 972, 39 L.Ed.2d 214 (1974). With the scant record now before the Court, it is impossible to make legal conclusions with certitude. The Court's duty at this stage is to draw all reasonable inferences in Plaintiffs' favor. Having done this, the Court believes it is not inconceivable that facts could be proven to demonstrate this statute does substantially impinge

upon protected conduct like speech. Consequently, the Court finds the complaint states a claim for a First Amendment overbreadth challenge sufficient to overcome a motion to dismiss.

b) *Vagueness*

The Court also preliminarily finds this statute fails to include certain features, such as "fair notice or warning," sufficient to provide the definiteness necessary in a criminal statute. *Smith v. Goguen*, 415 U.S. 566, 572, 94 S.Ct. 1242, 1246, 39 L.Ed.2d 605 (1974). For example, the statute does not explicitly limit its prohibitions to physical blockage of health care facilities. Indeed, the statute strongly implies that its reach goes beyond mere physical obstruction contemplating other forms of obstruction in subsection (e) which provides, "This section shall not prohibit any person from engaging in lawful speech or picketing *which does not impede or deny another person's access to health care services* ... or *interfere with the delivery of health care services within a health care facility. Id.* §§ (e) (emphasis added). Two observations may be made about this provision.

First, by explicitly protecting "speech or picketing which does not impede ... or interfere" with certain activities, the statute permits a strong negative inference that it contemplates speech which does impede or interfere with another's access and that it criminalizes that speech. When asked why this subsection was necessary if subsection (a) was so clear, counsel for the State replied that it was possible for a person to engage in speech "so obstreperous" that it would impede access to a health care facility. Webster's Dictionary defines "obstreperous" as an adjective which means "noisily resisting control or defying commands." *The New Lexicon Webster's Dictionary of the English Language* 693 (1989 ed.). Then, counsel added that she could not imagine this provision would apply to speech unless "someone really crosses the line." But, the question then becomes, whose line; the North Carolina Legislature's, hers, a group of police officer's or that of some

other sage.

The Court knows of few protests or pickets that are subdued and known for their mannerliness. Yet, they enjoy the highest rank of protection afforded by the Constitution. Then the State's counsel's brief states that, by virtue of subsection (e), protests "are among those activities specifically permitted by the challenged statute...." The State's Brief p. 2. The Court can only guess how counsel knows this and if a non-arbitrary line can be drawn within the parameters of this law. It is well established that "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Id.* at 573, 94 S.Ct. at 1247. If anything, the State's attorney's confusion over the matter demonstrates enough vagueness to overcome a motion to dismiss because it highlights "perhaps the most meaningful aspect of vagueness doctrine ... the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 575, 94 S.Ct. at 1248.

Second, this subsection appears to prohibit activities outside health care facilities which "interfere" with the delivery of services within the facilities. The Court can see how a group of people standing outside an abortion clinic proclaiming that multiple murders are taking place within could disrupt the conduct of clinic affairs if only by causing the patients and clinic staff to pause and consider what they are doing. This would seemingly involve interference with the delivery of services, however slight. It also potentially involves constitutionally protected activity. Thus, whatever else this provision might be, it also seems, at this stage, sufficiently vague to overcome a motion to dismiss. Therefore, Defendants' motions to dismiss for failure to state a claim are denied.

2) *The Jurisdictional Motions to Dismiss*

All Defendants challenge Plaintiffs' standing to bring this action and thereby this Court's jurisdiction over the subject matter of it. The Constitution confers jurisdiction to federal courts only where a live case or controversy is presented between adverse parties to an action. U.S. Const. art. III § 2. An essential aspect of the "case or controversy" requirement is the doctrine of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, ----, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). There are two types of standing; legal or constitutional and prudential. *Id.* The Court will consider each aspect of the standing requirement seriatim.

a) *Legal Standing*

Broadly speaking,

> the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975).

To establish constitutional standing, a plaintiff must first show he has,

> suffered and "injury in fact"--an invasion of a legally-protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* (citations omitted).

The Defendants claim Plaintiffs have failed to establish any actual or imminent injury in this case. The injury which Plaintiffs complain of is the deterrent effect on the free exercise of their First Amendment rights produced by fear of prosecution for violating § 14-277.4. Complaint ¶ 17H. Thus, the question before this Court is whether § 14-277.4, which the Court has already preliminarily concluded bears sufficient constitutional flaws to state a claim, poses a sufficiently imminent and real threat to Plaintiffs' rights to cause a cognizable injury in fact and thereby confer standing upon them to challenge the statute in court.

Plaintiffs must have a personal stake in the injuries they complain of. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The Plaintiffs claim they have a personal stake in this action because they are the persons who wish to freely protest abortion and educate others about their views, and are yet inhibited from doing so. Complaint ¶'s 10, 11. On a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [it is] 'presum[ed] that general factual allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, ----, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992). Thus, the Court finds it is Plaintiffs' own constitutional rights that are at stake, not those of some third party.

Plaintiffs must also demonstrate a direct injury in fact to their constitutionally protected rights. The Supreme Court has recognized that "it is not necessary that [plaintiffs] first expose [themselves] to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974). Instead, within the context of First Amendment challenges to the validity of a statute, the Supreme Court recognizes standing is found somewhere in between the realms of "[a]llegations of a subjective 'chill' ..." and actual arrest for the exercise of First Amendment rights. *Laird v. Tatum*, 408 U.S. 1, 13, 14, 92

S.Ct. 2318, 2325, 2326, 33 L.Ed.2d 154 (1972). The cloudy domain where one finds constitutional standing is referred to as the "threat of specific future harm ..." *Id.* at 14, 92 S.Ct. at 2326, which is sufficiently direct and "actual or imminent." *Lujan*, 504 U.S. at ----, 112 S.Ct. at 2136. The "genuine threat of enforcement" of a criminal statute which colorably invades First Amendment rights creates the objective chill of those rights that in turn gives plaintiffs standing to challenge its validity. *Steffel*, 415 U.S. at 475, 94 S.Ct. at 1223. Hypothetical or imaginary threats of prosecution, subjective fear of state backed sanctions, and feelings of inhibition are not enough to create constitutional standing.

1) *An Actual Injury*

To find an imminent threat of injury to First Amendment rights, a statute must be operative, not moribund. Courts have refused to find standing where a statute has rested in dormancy without any historical prosecutions. In *Doe v. Duling*, 782 F.2d 1202 (4th Cir.1986), the Fourth Circuit found standing was lacking where two plaintiffs who admittedly engaged in pre-marital sex challenged a Virginia fornication statute enacted in 1819. The *Duling* Court observed that no persons like the plaintiffs before it had been arrested for the type of conduct they wanted to engage in for at least ten years. That Court noted "[r]ecorded cases reveal that the application of the statutes to [non-prostitutional, heterosexual activities of two unmarried persons] is, at most, a matter of historical curiosity." *Id.* at 1206.

Thus, the *Duling* Court concluded that the threat posed to those plaintiffs was only theoretical, imaginary, and presented only a "subjective fear of prosecution" because the plaintiffs before it were faced with a moribund statute. *Id.* This case does not present the Court with a moribund statute. Here, the Plaintiffs are faced with a statute, like that in *Doe v.*

Bolton,[2] so new that it has yet to be fully enforced, and one that is intended to replace the trespass statute as it was applied to abortion clinics. Yet, the newness of this statute is also what gives it vigor and potential potency. While the Court knows of no prosecutions under this statute, this is not because the State lacks the will to bring them. Instead, there are no prosecutions because of § 14-277.4's youth, not the credibility of the threat that the State will enforce it against all people who engage in the conduct encompassed by its prohibitions. This statute is far from moribund;[3] it is not even yet adolescent. Its youth counsels not that it will go unenforced, but instead that the reach of its proscriptions and the zeal of their enforcement remains unknown. The Court finds Plaintiffs are faced with a statute that is alive and well, and backed by a State poised to fully enforce it and a known constituency very eager to have it enforced. It is no comfort to Plaintiffs, and of no benefit to Defendants, to claim the statute will not be enforced to infringe upon protected speech since "a genuine threat of enforcement of a *disputed* state criminal statute ..." is adequate to create standing. *Steffel*, 415 U.S. at 475, 94 S.Ct. at 1223 (emphasis added).[4]

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[2]"Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another Georgia abortion statute under which, we are told, physicians were prosecuted." *Doe v. Bolton*, 410 U.S. 179, 188, 189, 93 S.Ct. 739, 745, 746, 35 L.Ed.2d 201 (1973).

[3]N.C.G.S. § 14-277.4 was enacted on October 1, 1993, just over two months prior to the filing of Plaintiff's complaint. Plaintiffs' Exhibit B, ¶ 1, p. 1.

[4]The State concedes the conduct which Plaintiffs intend to engage in is constitutionally protected, but argues § 14.277.4(e) specifically excludes that conduct from its terms. But as previously noted, the State is not really sure what that provision means and the Court believes it can conceivably reach protected conduct. Yet, the State is confident Plaintiffs have no credible fear of prosecution. The State contends the fact that no persons engaging in protected conduct have yet to be prosecuted demonstrates they will not be

The threat of prosecution is only imminent if an operative statute exposes a plaintiff to criminal liability if he acts upon a present intent to exercise his rights. *Steffel*, 415 U.S. at 459, 94 S.Ct. at 1215. The Police Chief claims Plaintiffs' failure to specify a time certain in the future when they will exercise their constitutional rights amounts to the sort of " 'some day' intentions" which do not create the requisite imminence of threatened injury. But this argument misses the point of *Lujan* and particularly misconceives the nature of standing in the context of First Amendment cases. In *Lujan*, the Court was presented with plaintiffs "dedicated to wildlife conservation" who sought to challenge the inadequacy of government protections for certain endangered animal species. *Lujan*, 504 U.S. at ----, 112 S.Ct. at 2135. In that case,

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prosecuted. Surely this is a nonsequitur and one which the Court is sure is of no solace to Plaintiffs. "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett v. Bullitt*, 377 U.S. 360, 373, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964).

Furthermore, despite the assurances that the Charlotte-Mecklenburg County Police do not now believe § 14-277.4 can be used to prosecute First Amendment sheltered speech, it remains to be seen what other less magnanimous police departments under different legal guidance will do with this statute to persons other than these Plaintiffs. "[W]here the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims and ' "with no requirement that the person making the attack demonstrate that his own conduct could be regulated by a statute drawn with the requisite narrow specificity." ' " "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society--to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 957 and 958, 104 S.Ct. 2839, 2847 and 2848, 81 L.Ed.2d 786 (1984).

the Court noted the plaintiffs had a cognizable interest ("the desire to observe an animal species") *Id.* 504 U.S. at ----, 112 S.Ct. at 2137, but that their protected interest had not been directly affected by the regulation because they were in no way specifically connected to animals who were half a globe away. The Court concluded the plaintiffs had suffered an insufficiently direct injury because they only hoped to someday see the endangered animals which they were otherwise wholly unconnected to. *Id.* 504 U.S. at ----, 112 S.Ct. at 2138-2140.

In this case, "Plaintiffs have conveyed, and wish to continue to convey" their views through protected speech. Complaint at ¶ 11. Plaintiffs would presumably be presently protesting legalized abortion, and presumably would have protested yesterday, but for the existence of § 14- 277.4, the State's credible intent to enforce it, and the risk that it poses to protected speech. One essential aspect of the right to speak freely is the right to do so at a reasonable time of one's own choosing. The fact that Plaintiffs cannot mark a date certain on their calendar when they wish to protest does not mean their rights have not been directly and impermissibly inhibited. Thus, if anything, Plaintiffs' injury is not someday, but today, if their injury is understood as the restraint or chill on the exercise of their rights affected by § 14-277.4. The actual chill worked upon freely voiced dissent is the direct injury in this case. The Police Chief's view of immediacy has no relevance to this action since only "[w]here there is no actual harm, [must] imminence ... be established. *Lujan*, 504 U.S. 555, —, ft. nt. 2, 112 S.Ct. 2130, 2139, ft. nt. 2, 119 L.Ed.2d 351. Here, there is actual, not imminent, harm presented by a credible threat of prosecution under a proscriptive statute which may very well be enforced.

To establish a direct injury, there must be a "genuine threat of enforcement." *Steffel*, 415 U.S. at 475, 94 S.Ct. at 1223. In *Steffel*, the Supreme Court was faced with a Plaintiff who had been warned not to handbill and who "although he desired to return to the shopping center to distribute handbills,

... had not done so because of his concern that he ... would be arrested for violation [of the law]...." *Steffel*, 415 U.S. at 456, 94 S.Ct. at 1214. There the Court found the Plaintiff before it had not raised a "chimerical" concern of arrest but instead one that was real. This Court is presented with Plaintiffs who, unlike Mr. *Steffel*, have reason to believe they will be given no warnings at all if they engage in what they believe is protected conduct. Their first warning is their last. Charlotte-Mecklenburg Deputy Police Chief Laney has issued directives to enforce the statute and has told officers the three warnings which preceded an arrest under the trespass statutes are no longer necessary under § 14-277.4. Plaintiffs' Exhibit B p. 2. In short, the Court has every reason to believe the State will enforce this statute to its fullest extent, without warning.[5]

Prosecution under the instant statute is not hypothetical, but real. All that remains is the conduct of some citizen whom the State contends is in violation of § 14-277.4. Plaintiffs' injury is only made distant, if at all, by the Plaintiff's objective fear of the actual threat and their forbearance from protesting. Surely if a plaintiff who has received previous warnings has standing, then these Plaintiffs are not barred from challenging a statute's constitutionality because the State has assured them they will receive no warning at all when the statute is violated. *Steffel* acknowledges that Plaintiffs do not have to be arrested before they have standing and the fact that they will not be warned indicates that the injury is all the more immediate and real. Moreover, as previously noted, it is of no aid to Defendants to assure Plaintiffs that the statute will not be used to infringe upon protected rights because "a genuine threat of enforcement of a disputed state criminal statute" is

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[5]Since the Court has preliminarily concluded that § 14-277.4 is broad and vague enough to encompass First Amendment protected activity, it follows that enforcement of the statute would, if taken to its fullest extent, also sweep far enough to reach that protected conduct.

enough to confer standing. *Steffel*, 415 U.S. at 475, 94 S.Ct. at 1223. There is a genuine threat of enforcement of § 14-277.4 against Plaintiffs.

The Court also finds the threatened injury to Plaintiffs is direct. Plaintiffs' complaint makes clear they would be conducting the First Amendment protected activity today, as they have in the past, but for § 14-277.4. The fact that they have yet to be prosecuted, or even threatened with prosecution, is of no consequence since they, "have standing despite the fact that the record does not disclose that any one of them has been prosecuted or threatened with prosecution, for violation of the States' ... statute." *Doe*, 410 U.S. at 183, 93 S.Ct. at 743. In *Doe*, the Supreme Court was faced with physicians who wished to perform abortions--a right which they believed was protected by the Constitution--but were inhibited from doing so by a statute which criminalized abortion. The Court believes the Plaintiffs in the present action are in a position identical to that of the abortionists in *Doe*. The Supreme Court noted the doctors in *Doe* were,

> the one[s] against whom these criminal statutes directly operate in the event [t]he[y] procure[ ] an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Id.* at 188, 93 S.Ct. at 745.

Like the plaintiffs in the long line of cases that recognize the Constitution is violated when First Amendment rights are chilled,[6] the Plaintiffs before the Court are not laboring

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[6]*See, Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Lamont v. Postmaster General*, 381

under the subjective chill of their free speech rights. Plaintiffs have more that just "knowledge that a governmental agency ... might in the future take some ... action detrimental to [them]." *Laird*, 408 U.S. at 11, 92 S.Ct. at 2324. They are instead persons challenging proscriptive governmental power which they are "proscriptively subject to...." *Id.* Therefore, the Court holds that Plaintiffs are faced with a credible threat of prosecution sufficiently direct to provide them with a cognizable injury in fact. Their First Amendment rights are objectively chilled by the real possibility of a criminal prosecution for protesting legalized abortion in North Carolina.

2) *Causation and Redressibility*

The Court also concludes that the threat of prosecution is causally related to Plaintiffs harm and that this harm is redressable by the Court. The Plaintiffs would plainly be the object of prosecution were they to run afoul of the already noted ambiguity and overbreadth of § 14.277.4. It is well-settled that where the plaintiff is himself the object of the contested action "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at ----, 112 S.Ct. at 2137. Therefore, the Court concludes the Plaintiffs have legal standing to challenge the constitutionality of N.C.G.S. § 14-277.4.

b) *Prudential Standing*

"Apart from th[e] minimum constitutional mandate, [there are] other limits on the class of persons who may invoke the courts' decisional and remedial powers." *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205. The Supreme Court has said federal courts ought not insert themselves into otherwise justiciable controversies when "the asserted harm is a

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U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965).

'generalized grievance' shared in substantially equal measure by all or a large class of citizens...." *Id.* This is not the sort of controversy presented to this Court in this case. If anything, the Plaintiffs before the Court are a dissident minority of citizens who have grievances different in substance and intensity from those of a substantial majority of their fellow citizens. The Supreme Court has also recognized that federal courts ought to avoid deciding controversies posed by plaintiffs seeking to assert "the rights or interests of third parties." *Id.* As previously mentioned, the Plaintiffs in this action are asserting their own rights to free speech. Therefore, the Court denies Defendants' motions to dismiss for lack of subject matter jurisdiction.

c) *Abstention*

All Defendants invoke *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1970), to urge this Court to abstain from exercising its jurisdiction over this action. *Pullman* holds that a federal court presented with unclear state law should abstain from exercising jurisdiction until a state court has been given an opportunity to clarify the law and thereby remove the need for determining a constitutional dispute. *Younger* holds that even federal courts presented with justiciable controversies are forbidden "to stay or enjoin pending state court proceedings except under special circumstances." *Id.*, at 41, 91 S.Ct. at 749. Thus, *Pullman* applies to the discretionary exercise of jurisdiction itself by a federal court and *Younger* is directed at the authority of federal courts to dispense particular sorts of remedies. Yet, it has been said that "abdication or postponement of federal court jurisdiction to accommodate state court adjudication ... 'is the exception, not the rule.' " *Cox v. Planning District I Community Health Board*, 669 F.2d 940, 942 (4th Cir.1982), *quoting*, *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976).

The Court will discuss the dimensions of *Younger* abstention *infra* in its treatment of Plaintiffs' application for injunctive relief. For present purposes, the Court notes that the Supreme Court held unanimously in *Steffel* that,

> regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied. *Steffel*, 415 U.S. at 475, 94 S.Ct. at 1223.

The rationale for *Steffel* was two-fold. First, the Court recognized that,

> a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. *Id.* at 462, 94 S.Ct. at 1217.

Second, the Court observed that "Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head." *Id.* at 472, 94 S.Ct. at 1222. Clearly, this Court is not precluded by *Younger* from exercising the jurisdiction conferred by the Declaratory Judgment Act because there is no pending state prosecution of the plaintiffs before it and they are seeking declaratory relief as well as injunctive remedies.[7]

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[7]Counsel for the Police Chief believes Plaintiffs have impaled themselves upon the horns of a considerable dilemma. At oral argument, he pointed out that either Plaintiffs are not immediately threatened with prosecution--in which case they have

Turning to Defendants' requests that this Court exercise *Pullman* abstention, it is worth noting that "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett*, 377 U.S. at 375, 84 S.Ct. at 1324. The Court is also mindful that "abstention cases have dealt with unresolved questions of state law which *only a state tribunal could authoritatively construe.*" *Wisconsin v. Constantineau*, 400 U.S. 433, 438, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971) (emphasis added). The State, curiously, believes this Court should abstain because it is confident, "that the North Carolina appellate courts will adopt a constitutionally appropriate interpretation of the statute." State's Brief p. 8. If this statute is so obviously reconcilable with the Constitution, then why not have this Court declare it so now? Alternatively, if § 14-277.4 obviously offends the Constitution, there is no sensible reason to await a state court ruling to that effect when this Court can, and by virtue of the 14th Amendment must, declare it so quickly and remove any obstacle to the freedom of speech. If the constitutionality of the statute is a close call, then this Court (like all other courts) has the duty to make that call. To do so now no more offends federalism than the Fourteenth Amendment.[8] Indeed, this case is more

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no standing--or they are immediately threatened with prosecution in which case *Younger* mandates that this Court entirely abstain. But this argument's second premise is invalid because *Younger* does not mandate abstention when prosecution is imminently threatened. Instead, it holds, within the context of "pending state court proceedings ..." that "the possible unconstitutionality of a statute ... does not in itself justify an *injunction* ..." *Id*. 401 U.S. at 41 and 54, 91 S.Ct. at 749 and 755. *Younger* only requires federal courts abstain from enjoining pending state prosecutions.

[8]Defendants believe this Court's opinion in *Floyd v. Thornburg*, 619 F.Supp. 756 (W.D.N.C.1985) compels abstention in this case. *Floyd* is readily distinguishable from the present case

like that presented to the Court in *Wisconsin v. Constantineau* where it observed, "the naked question, uncomplicated by an unresolved state law, is whether [the] Act on its face is unconstitutional." *Id.*, at 439, 91 S.Ct. at 511. In such a case, "abstention should not be ordered merely to await an attempt to vindicate the claim in a state court." *Id.*

The Court believes that if it were to abstain in this case, it would place the Plaintiffs, or others like them, in the untenable position of enduring "extensive adjudications, under the impact of a variety of factual situations, [which] would bring the [statute] within the bounds of permissible

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and indeed weakens Defendants' abstention arguments. In *Floyd*, this Court was presented with a complaint advancing a positively ludicrous argument that North Carolina's anti-obscenity law transgressed the First Amendment because it " 'criminalize[d] ... "oral intercourse" which is speech itself since both words together only relate to verbal discourse....' " and its prohibition of materials depicting sadomasochism and self-flagellation criminalized pictures of people in bizarre costumes. *Id.* at 759. Faced with such a laughable argument, and little or no danger to the First Amendment, this Court decided on federalism grounds that the courts ought not "look over the [states'] shoulder with a view to revising to the Court's satisfaction every Act passed" when the Constitution is not even remotely implicated. *Id.*, at 760. This Court reaffirms its constitutional obligation under the Federal Constitution to respect the rights of the states which do not depend on the courtesies of the federal government. "[O]ur constitutional system [does not establish] courts [as] roving commissions assigned to pass judgment on the nation's laws." *Id.*, at 761. But the most important feature of our constitutional system is that it involves a supreme law--the Constitution. When the Constitution *adopted by the states* is seriously implicated, as the Court believes it is in this case, federalism is not at stake; whereas the Constitution is. The Court believes the issues presented to it in this case implicate the federalism concerns that motivated its decision in *Floyd* about as much as oral copulation implicates the First Amendment.

constitutional certainty." *Id.* 377 U.S. at 378, 84 S.Ct. at 1326. In such a posture, "abstention [would] operate to require piecemeal adjudications in many courts, thereby delaying the ultimate adjudication on the merits for an undue length of time." *Id.* This is particularly intolerable where the piecemeal litigation would likely occur within the context of the criminal prosecution of these Plaintiffs and others without any clarification of the constitutional dimensions of this statute.

Furthermore, *Pullman* does not mandate abstention, even where state law is unclear, if constitutional rights are at stake. Indeed, "[w]hen federal claims are premised on 42 U.S.C. § 1983 ...--as they are here--we have not required exhaustion of state judicial ... remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel*, 415 U.S. at 472, 473, 94 S.Ct. at 1222. Where, as here, the ambiguity of state law itself gives rise to injuries of constitutional proportion, the best course of action is not to abstain, but to rule so as to either protect those rights, or alleviate any concern about their infringement by state law. Accordingly, Defendants' motions to abstain are denied.

3) *The Motion for Injunctive Relief*

Plaintiffs' requests for injunctive and declaratory relief do not present "a single issue." *Steffel*, 415 U.S. at 463, 94 S.Ct. at 1217.

> Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable is amply evidenced by the legislative history of the Act...." *Id.* at 466, 94 S.Ct. at 1219.

The Court believes this case, much like *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) which reaffirmed

the propriety of deciding declaratory relief apart from the issuance of an injunction, is just such a case where declaratory relief is more fitting than injunctive remedies. This conclusion is supported by *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 which held "that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it...." *Id.* at 54, 91 S.Ct. at 755. *Younger* was decided largely upon federalism grounds. Mr. Justice Black, speaking for the *Younger* Court, explained the rationale for this holding by noting that, in a passage worthy of quoting at length,

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate function in their separate ways. The concept does not mean blind deference to "States' Rights" any more that it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early days of our Union of States, occupies a highly important place in our Nation's history and its future. *Id.* at 44, 45, 91 S.Ct. at 750-51.

It is this high view of federalism that motivates this Court's decision to decline Plaintiffs request for injunctive relief.

Declaratory relief is more fitting in this case because it

involves the most minimal intrusion possible into the State of North Carolina's constitutionally recognized province of enforcing its criminal law. *Id.* 415 U.S. at 469, 94 S.Ct. at 1220. The Court's preference for declaratory relief has nothing to do, either way, with its forecast of who will prevail on the merits of this action. Instead, the Court believes injunctive remedies are not *necessary* to adequately protect the rights of the Plaintiffs now before it because "even irreparable injury is insufficient unless it is 'both great and immediate.' " *Id.* 401 U.S. at 46, 91 S.Ct. at 751. Such strong medicine as a broad injunction goes too far given the present posture of this action. One essential feature of our constitutional structure--federalism--demands that, "[f]ederal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if the statutes are unconstitutional." *Id.* at 46, 91 S.Ct. at 751. Thus, Plaintiffs' requests for a temporary restraining order and a preliminary injunction will be denied.

SUMMARY

To summarize, the Court denies Defendants' motions to dismiss for failure to state a claim, for lack of subject matter, and to abstain. The Court also denies Plaintiffs' application for a temporary restraining order or preliminary injunction. The Court directs Defendants to file their answers, as required by Rule 12(a), "within 10 days after notice of the court's action...." Fed.R.Civ.P. 12(a).

NOW, THEREFORE, IT IS ORDERED that Defendants' (James B. Hunt, the State of North Carolina, and the Police Chief) motions to dismiss for failure to state a claim upon which relief can be granted be, and hereby are, DENIED.

IT IS FURTHER ORDERED that Defendant Charlotte-Mecklenburg Police Department's motion to dismiss for failure to state a claim upon which relief can be granted be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that Defendants' motions to dismiss for lack of subject matter jurisdiction be, and hereby are, DENIED.

IT IS FURTHER ORDERED that Defendants' motions for this Court's abstention be, and hereby are, DENIED.

IT IS FURTHER ORDERED that Plaintiffs' applications for a temporary restraining order and a preliminary injunction be, and hereby are, DENIED.

IT IS FURTHER ORDERED that Defendants file their answers as required by Federal Rule of Civil Procedure 12(a).

JUDGMENT

THIS MATTER is before the Court on Defendant's (Charlotte-Mecklenburg Police Department) motion to dismiss, filed January 3, 1994.

NOW THEREFORE, in accordance with the Memorandum of Decision and Order filed simultaneously with this Judgment, IT IS ORDERED, ADJUDGED, AND DECREED:

1) That this action be, and hereby is, DISMISSED with prejudice as to the Charlotte-Mecklenburg Police Department only.

2) That Plaintiff shall recover nothing from Defendant.

3) That each party shall bear its own costs.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

SHARON HOFFMAN, *et al*	)	CIVIL ACTION NO.
	)	3:93 CV 393 P
vs.	)	
	)	ORDER ALLOWING
JAMES B. HUNT, *et al*	)	THE FILING
	)	OF AN AMENDED
	)	COMPLAINT

[Filed July 13, 1994]

Plaintiffs having filed a motion seeking leave to file an amended complaint, and it appearing to the Court that:

1. The original complaint in this case was filed on December 6, 1994.

2. The original complaint challenged the constitutionality of a state statute known as N.C.G.S. 14-277.4 which criminalizes certain activities in the vicinity of medical facilities.

3. On May 26, 1994 the President of the United States signed into law the "Freedom of Access to Clinic Entrances" Act (FACE) which the plaintiffs contend contains similar prohibitions and which Plaintiffs contend raises similar constitutional issues to those raised in the original complaint in this matter.

4. Plaintiffs seek to amend their complaint to add a new cause of action challenging the constitutionality of FACE.

5. FACE creates a cause of action for the Defendant State of North Carolina. 18 U.S.C. section 248(C)(3).

6. Plaintiffs allege a real issue in controversy and a "chilling effect" from FACE which are substantially similar to allegations contained in their original complaint challenging N.C.G.S. 14-277.4.

7. It appears that the issues and arguments pertaining to the new cause of action will substantially overlap the issues and arguments surrounding the existing controversy between the parties as framed by the original complaint.

8. The filing of an amended complaint will facilitate the speedy and efficient resolution of two essentially parallel legal disputes between the parties.

9. The filing of an amended complaint will not prejudice the Defendants.

WHEREFORE, it is ordered, adjudged and decreed that the Plaintiffs are granted leave to file the Amended Complaint as shown and described in Plaintiffs' motion seeking leave to file said pleading. Plaintiffs shall serve the filed amended complaint upon the remaining Defendants in this action and the Defendants shall be allotted time to file responsive pleadings as provide by Rule 15 of the Federal Rules of Civil Procedure.

This 13th day of July, 1994

/s/Robert D. Potter
Robert D. Potter
United States District Court Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

SHARON HOFFMAN, *et al.*,	)	
Plaintiffs,	)	
vs.	)	Civil Action No.
	)	3: 93 CV 393 P
JAMES B. HUNT, *et al.*,	)	
Defendants.	)	

[Filed August 11, 1994]

ORDER DENYING MOTION TO DISMISS

Defendants having filed a motion to dismiss under Rule 12(b)(7), Fed. R. Civ. P., and it appearing to the Court that:

1. Plaintiffs' Amended Complaint challenges the constitutionality of the Freedom of Access to Clinic Entrances (FACE), 18 U.S.C. § 248.

2. The United States is not a party to this action.

3. Pursuant to 28 U.S.C. § 2403(a), the United States may intervene in this action, but need not do so.

4. The United States is not an indispensable party to this action. However, the Attorney General of the United States is entitled to notice of the present action under 28 U.S.C. § 2403(a). See also Rule 24(c), Fed. R. Civ. P. The clerk of this

Court provided that notice on August 2, 1994.

5. The State of North Carolina is a party defendant to this action.

6. FACE authorizes state attorneys general to commence civil actions, in the name of such state, to enforce FACE. See 18 U.S.C. § 248(c)(3).

7. Accordingly, the State of North Carolina is a proper defendant in this action, and the Attorney General of North Carolina is not an indispensable party.

WHEREFORE, it is ordered, adjudged and decreed that defendants' Motion to Dismiss under Rule 12(b)(7), Fed. R. Civ. P., is hereby DENIED. Pursuant to Rule 12(a), Fed. R. Civ. P., Defendants shall have ten (10) days after the notice of this order to file a responsive pleading.

This 11th day of August, 1994.

/s/ Robert D. Potter
Robert D. Potter
Senior United States District Court Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3: 93 CV 393 P

SHARON HOFFMAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ORDER
	)	
JAMES B. HUNT, and STATE OF NORTH CAROLINA,	)	
	)	
	)	
Defendants.	)	
	)	
	)	

[Filed November 29, 1994]

THIS MATTER is before the Court on Defendant's motion, filed August 10, 1994, to hold Plaintiffs' motion for injunctive relief in abeyance. On August 25, 1994, the United States of America, intervenor-defendant, also moved to stay consideration and disposition of Plaintiffs' motion for injunctive relief. Plaintiff filed a memorandum in opposition to Defendant's motion on August 26, 1994 and a memorandum in opposition to the United States' motion on September 8, 1994. The United States filed a reply on October 4, 1994.

The United States Court of Appeals for the Fourth Circuit is presently considering the case American Life League et al. v. The United States of America, et al., No. No. 94-1869 (4th Cir. docketed July 7, 1994), which will hopefully resolve the constitutionality question surrounding the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, also known

as FACE. The Court believes it most advisable to defer ruling on the instant question until after the Fourth Circuit Court has spoken. In the present litigation, although plaintiffs contend that "the points and authorities challenging the constitutionality of FACE are more well developed, through, and completely presented than in the American Life League case," the Complaint, at its core, is not significantly different from the American Life League challenge in that it focuses on the constitutionality of the Act.

In any event, this Court believes that it is prudent to await resolution by the Fourth Circuit Court of the issues pending in American Life League before moving forward with these proceedings. Accordingly, the Court will reserve ruling on any issues related to FACE until a decision by the Fourth Circuit Court in American Life League, et al. v. The United States of America, et al., No. No. 94-1869 (4th Cir. docketed July 7, 1994) is rendered.

NOW, THEREFORE, IT IS ORDERED that Defendants' motion to hold Plaintiffs' motion for injunctive relief in abeyance be, and hereby is GRANTED.

IT IS FURTHER ORDERED that

(1) All further proceedings in this action related to FACE, including the requirement for defendants to file responsive pleadings or appropriate motions in lieu of responsive pleadings be, and hereby are, STAYED, pending resolution of the issues in American Life League, et al. v. The United States of America, et al., No. 94-700-A (E.D.Va. June 16, 1994, appeal pending, No. 94-1869 (4th Cir. docketed July 7, 1994)
.

(2) The parties shall notify the Court within (5) five days after issuance of the opinion of the United States Court of Appeals for the Fourth Circuit in American Life League.
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(3) The Defendants shall file responsive pleadings or

appropriate motions in lieu of responsive pleadings within twenty (20) days from the date of issuance of such mandate.

This the 29th day of November, 1994.

/s/ Robert D. Potter
Robert D. Potter
Senior United States District Court Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3: 93 CV 393 P

SHARON HOFFMAN, TRUDIE MATTHEWS, DIANE HOEFLING, REV. RONNIE WALLACE, and REV. JOHN BRADLEY, Plaintiffs,	)	
v.	)	ORDER
JAMES B. HUNT, and STATE OF NORTH CAROLINA, Defendants.	)	

[Filed October 17, 1995]

STATUS OF CASE

On December 6, 1993, Plaintiffs filed a Complaint (document # 1) praying for a Declaratory Judgment, a temporary restraining order, and a preliminary injunction, naming as Defendants N.C. Governor James B. Hunt, the State of North Carolina, the Charlotte- Mecklenburg Police Department, and D. R. Stone, Police Chief.

The Plaintiffs' Complaint challenged the constitutionality of N.C.G. Stat. § 14-277.4, a statute which criminalizes certain forms of civil protest at health care facilities.

On December 29, 1993, Defendants Hunt and the State

of North Carolina filed motions to dismiss for Plaintiffs' lack of standing, failure to state a claim, lack of subject matter jurisdiction, and alteratively, to abstain (document # 11).

On January 3, 1994, Defendants Stone (the Police Chief) and the Charlotte-Mecklenburg Police Department also filed motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, failure to state a claim, and, alternatively, to abstain (document # 14). After oral argument on January 14, 1994 and a review of the Complaint, Plaintiffs' and Defendants' briefs, and a review of the affidavits and other exhibits and the case law, the Court, in an Order filed February 22, 1994, denied the motions of Hunt and the State of North Carolina and granted the motions of the Charlotte-Mecklenburg Police Department and Police Chief Stone. The Court further denied the Plaintiffs' application for a temporary restraining order and a preliminary injunction, and determined that declaratory relief was more appropriate because it involved the most minimal intrusion possible into the State's constitutionally recognized provence of enforcing its criminal law. The Court then ordered the Defendants to file their answers as required by Federal Rules of Civil Procedure 12(a). Defendants Hunt and the State of North Carolina filed answer on March 4, 1994 (documents # 19 & # 20).

Subsequently on May 26, 1994, the President of the United States signed into law the "Freedom of Access to Clinic Entrances Act of 1994" (FACE), Pub. L. No. 103-259, 108 Stat. 694, codified as Title 18, Section 248. Section 248(c)(3) of that Act authorized action by the State Attorney General in the name of the State.

On June 15, 1994, the Plaintiffs filed a motion for leave to file an amended complaint to add a new cause of action challenging the constitutionality of FACE (document # 32). Leave was granted by this Court on July 13, 1994, and the amended complaint was filed July 19, 1994 (documents # 34 & # 35).

The Plaintiffs then filed a motion for preliminary injunction on July 28, 1994 (document # 36).

On August 1, 1994, the remaining Defendants Hunt and the State of North Carolina filed a motion to dismiss plaintiffs' amended complaint pursuant to Rule 12(b)(7) of the Federal Rules of Civil procedure because the Plaintiffs had failed to join the Attorney General of North Carolina and the Plaintiffs' challenge to the constitutionality of FACE has not been certified by this Court to the Attorney General of the United States so that the United States may intervene in this case (document # 44). The Defendants contend that Rule 19(a) of the Rules of Civil Procedure Require the joinder of those parties to insure protection of the interests of existing parties in securing complete relief and avoid repeated lawsuits.

On August 2, 1994, the Clerk of this Court gave the required "Notice of Claim of Unconstitutionality" of 18 U.S.C. § 248 to the Attorney General of the United States (document # 45).

The Defendants' motion to dismiss, filed August 1, 1994, was denied by this Court by Order filed August 11, 1994 (document # 48).

Meanwhile, on August 10, 1994 the Defendants filed a "Motion to Hold Plaintiffs' Motion for Injunctive Relief in Abeyance" pending resolution of the issues in *American Life League, et al. v. The United States of America, et al* . which at that time was pending before the Fourth Circuit Court of Appeals (document # 47). That case was decided by the Fourth Circuit on February 13, 1995, and is reported at 47 F.3d 643 (4th Cir. 1995). The Fourth Circuit affirmed the District Court's decision dismissing the complaint holding that (1) FACE is within the power of Congress; (2) the Act does not violate the First Amendment free speech clause; (3) the Act is neither overbroad nor vague; (4) the Act's liquidated damages provision does not violate the First Amendment, and (5) the

Act does not violate free exercise of clause of Religious Freedom Restoration Act. Petition for certiorari was denied by the United States Supreme Court on October 2, 1995. 64 USLW 3239.

On August 25, 1994 the United States Attorney General filed a motion to intervene (document # 49) and a motion to stay (document # 50).

On August 26, 1995, the Plaintiffs filed a memorandum in opposition to Defendants' Motion to Hold the Requested Injunctive Relief in Abeyance (document # 51).

On August 30, 1994, the Defendants Hunt and the State of North Carolina filed an answer to the amended complaint (document # 52).

On September 8, 1994, the Plaintiffs filed a memorandum in opposition to Intervenor Defendant's Motion to Stay (document # 53), followed by the reply of the United States filed October 4, 1994 (document # 54).

On November 29, 1994, the Court granted Defendants' motion to hold Plaintiffs' motion for injunctive relief in abeyance (document # 60).

On March 6, 1995, the State Defendants moved to dismiss and for summary judgment together with a memorandum of law (documents # 61 & # 62).

On April 27, 1995 (after a grant of extension of time) the Plaintiffs' filed their memorandum in opposition to State Defendants' motion to dismiss and motion for summary judgment (document # 66).

On April 26, 1995 the United States Supreme Court decided *U.S. v. Lopez*, ___ U.S. ___ 115 S.Ct 1624 (1995) in which the Court held that the Gun Free School Zones Act making it a federal offense for any individual knowingly to

possess a firearm at a place that individual knows is a school zone, exceeded Congress' commerce clause authority since possession of gun in local school zone was not economic activity that substantially affected interstate commerce.

This appears to be the first time in 60 years that the Supreme Court has taken a turn toward a more restrictive interpretation of the commerce clause and recognizes meaningful limits on the commerce power of Congress.

The Plaintiffs have filed a memorandum in opposition to Defendants' motion to dismiss and motion for summary judgment, asserting that FACE is an unconstitutional exercise of Congressional authority under the commence clause of the United States Constitution (document # 69). Given the U.S. Supreme Court's decision in *Lopez*, decided after *American Life League*, the Court is uncertain as to the force of *American Life League* in the case before this Court.

Consequently, the Court believes it would be helpful for the parties to file briefs as to the affect, if any, the holding in *Lopez* may have on the issue before this Court as to the power of Congress under the commerce clause to enact a criminal statute regulating the activity of the Plaintiffs in this case.

NOW, THEREFORE, IT IS ORDERED:

(1) The Court's Order filed November 29, 1994, granting Defendants' Motion to hold plaintiffs' motion for relief in abeyance (document # 60) is **VACATED.**

(2) The parties will file briefs with the Court **no later than November 17, 1995**, discussing the affect, if any, of the decision in *U.S. v. Lopez* upon the Congress' authority to enact FACE on the grounds that it rationally concluded that the regulated activity affects interstate commerce. The parties should address the specific findings made by Congress in explanation of how the activity prohibited by FACE burdens interstate commerce including the factual findings made by

Congress to support its conclusion that the regulated activity affects interstate commerce under Article 1 Section 8[3] of the United States Constituion. See *U.S. Code Congressional and Administrative News 103rd Congress, Second Session 1994,* pp. 699-731.

(3) No reply briefs will be allowed by either party.

This the 17th day of October, 1995.

/s/ Robert D. Potter
Robert D. Potter
Senior United States District Court Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3: 93 CV 393 P

SHARON HOFFMAN, TRUDIE MATTHEWS, DIANE HOEFLING, REV. RONNIE WALLACE, and REV. JOHN BRADLEY, Plaintiffs,	)	
v.	)	ORDER
JAMES B. HUNT, and STATE OF NORTH CAROLINA, Defendants.	)	

[Filed November 7, 1995]

THIS MATTER is before the Court in connection with its Order dated October 17, 1995.

Upon review of the pleadings filed thus far in this case, the Court finds that it is necessary to take further evidence. Therefore, the Court will hold an evidentiary hearing on January 8, 1996, beginning at 9:30 a.m., to hear testimony and take any other relevant evidence concerning the Defendants' application of N.C. Gen. Stat. § 14-277.4 to the protest activities of the Plaintiffs.

IT IS SO ORDERED this 7th day of November, 1995.

/s/ Robert D. Potter
Robert D. Potter
Senior United States District Court Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3: 93 CV 393 P

SHARON HOFFMAN, TRUDIE MATTHEWS, DIANE HOEFLING, REV. RONNIE WALLACE, and REV. JOHN BRADLEY, Plaintiffs,	)	
v.	)	ORDER
JAMES B. HUNT, and STATE OF NORTH CAROLINA, Defendants,	)	
THE UNITED STATES OF AMERICA, Intervenor.	)	

[Filed April 30, 1996]

THIS MATTER is before the Court on the motions of the State Defendants and Federal Intervenors to have this Court stay its judgment pending appeal. For the reasons stated herein, those motions will be denied.

The parties have moved for a stay of this Court's order pursuant to Fed.R.Civ.P. 62(c). The Supreme Court has stated that courts considering motions under Rule 62(c) should consider the following factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.

Hilton v. Braunskill, 107 S. Ct. 2113, 2119 (1987).

I. Disposition of the State's Motion.

The State offers three categories of arguments in support of its motion to stay enforcement of this Court's judgment pending its appeal. First, the State argues that the Fourth Circuit's opinion in *American Life League*, 47 F.3d 642 (4th Cir. 1995) indicates that this Court's vagueness and overbreadth holdings are flawed and will be overturned on appeal. Second, the State argues that it will be irreparably injured if a stay is granted because N.C.G.S. § 14-277.4 furthers important state interests. Third, the State argues the Plaintiffs have not been arrested under the state statute thus far such that they will not be injured by enforcement of the statute pending the appeal. The Court will address each of the State's arguments in turn.

A. Likelihood of Success on Appeal.

The State believes that the Fourth Circuit's opinion in *American Life League*, supra, indicates that this Court's judgment will he reversed on appeal. The State's first premise is that its statute contains language "substantially similar" to that used in 18 U.S.C. § 248 (F.A.C.E.) the statute at issue in *American Life League*. So saying, the State argues that this Court's vagueness and overbreadth holdings are at odds with the Fourth Circuit's analysis. More specifically, the State believes that the following passage in *American Life League* indicates that this Court erred when it held N.C.G.S. §14-277.4 was overbroad:

> As for overbreadth, 'only a statute that is substantially overbroad may be invalidated on its face.' Such an invalid

> statute proscribes so much protected speech that it must be struck down entirely. Accordingly, the overbreadth doctrine is 'strong medicine' to be applied 'sparingly and only as a last resort.' Even though the Act might be applied to some protected expression, such as peaceful picketing, that picketing would be prohibited only in the most narrow and justifiable circumstances. Under the Act, 'physical obstruction' involves intentionally 'rendering passage to or from such a facility . . . unreasonably difficult or hazardous.' Thus, it is difficult to see how the Act is substantially overbroad in relation to its legitimate scope of outlawing violence to access."

American Life League, 47 F.3d 652-53 [citations omitted]. Similarly, the State believes that this Court's vagueness holding is at odds with the Fourth Circuit's opinion insofar as that Court held that F.A.C.E. was not overbroad relying on *Cameron v. Johnson*, 88 S. Ct. 1335 (1968). Here, the States cites *Cameron*, where the Supreme Court reasoned that "[t]he terms `obstruct' and `unreasonably interfere' plainly require no `guess[ing] at [their] meaning.' Appellants focus on the word `unreasonably.' It is a widely used and well understood word and clearly so when juxtaposed with `obstruct' and `interfere.'" *Id.* at 1338 [all but first brackets in the original].

This Court does not believe that the Fourth Circuit's opinion in *American Life League* supports the conclusions urged by the State. Indeed the State seems to miss the whole point of this Court's earlier opinion and glosses over the differences between N.C.G.S. § 14-277.4 and F.A.C.E. which indicate that the state statute is overbroad and vague. For when the Fourth Circuit held that F.A.C.E. was not overbroad it specifically noted that F.A.C.E. prohibited physical obstructions that intentionally render impassable ingress to, or egress from, a facility, or render passage to a facility unreasonably difficult or hazardous. *American Life League*, 47 F.3d at 653. Similarly, when the Fourth Circuit held that the statute was not vague it relied, *inter alia*, upon the federal statute's limiting definitions, *id.*, and cited *Cameron, supra.*, where the statute

prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress" to a courthouse. *Cameron*, 88 S. Ct. at 1338.

Nothing in *American Life League* or the cases the State has cited compel the conclusion urged by the State. Quite the contrary, this Court believes F.A.C.E. survived the overbreadth and vagueness challenges because its *mens rea* and reasonableness requirements led the Fourth Circuit to conclude that F.A.C.E. would prohibit picketing "only in the most narrow and justifiable circumstances" and because it "informed those opposed to abortion that they will not offend this law by peaceful, non-obstructive picketing." *American Life League*, 47 F.3d at 653. Thus, the Fourth Circuit's holding fits well within those cases where statutes implicating First Amendment activity withstand vagueness and overbreadth challenges because they are tailored to avoid substantial burdens on First Amendment rights through the inclusion of a *mens rea* requirement, *see Cox v. Louisiana*, 85 S. Ct. 476, 478 (1965) (parading or picketing with intent to interfere with, obstruct, or impede the administration of justice); *Grayned v. City of Rockford*, 92 S. Ct. 2294, 2298 (1972) (willfully making noise that disturbs classroom); the inclusion of a reasonableness requirement, *see Cameron v. Johnson*, 88 S. Ct. 1335, 1338 (obstruction or unreasonable interference with ingress or egress from courthouse); *Boos v. Barry*, 108 S. Ct. 1157, 1168 (1988) (statute construed to permit dispersal of protestors only when police reasonably believe that there is a threat to security or peace of the embassy), or a judicial or administrative interpretation that properly limits the statute. *See Boos*, 108 S. Ct. at 1169; *Grayned*, 92 S. Ct. at 2301 (statute construed to reach only actual or imminent interference with order in the school); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2756 (1989) (administrative interpretation of guideline relevant to facial challenge). Taken together, these cases also indicate that such tailoring devices are essential because they ensure that otherwise broadly worded statutes do not place a substantial burden on the exercise of First Amendment rights. *See e.g. City of Houston v. Hill*, 107 S. Ct. 2502, 2508

(1987) (first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2758 (1989) (regulation cannot burden substantially more speech than is necessary to further the government's's interest. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.)

North Carolina' statute is not so tailored and therefore it suffers from the related vices of vagueness and overbreadth. Indeed, the evidence in this case concerning the statute's application shows that the statute has been applied to reach so much protected activity that the Plaintiffs have been driven from the sidewalks. *Cf. City of Houston v. Hill*, (using evidence of statute's application to support holding the statute was overbroad and vague).[1] That evidence makes the statute's overbreadth and vagueness perfectly clear (indeed the clearest thing about the statute). Such applications of the State statute are possible because the State statute, unlike F.A.C.E., contains

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[1]Because the State statute fails on these vagueness and overbreadth grounds the Court need not consider the Plaintiffs' argument that the State statute is not a reasonable time, place, and manner restriction on their protected activity although the Court's holding necessarily implies that the statute is not narrowly tailored to achieve the State's significant governmental interest. *See American Life League*, 47 F.3d at 652 n. 4 (noting interrelationship between these holdings); *see also* and compare *City of Houston v. Hill*, 107 S. Ct. 2502, 2508 (1987) (Court addressing overbreadth challenge and stating that first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2758 (1989) (Court applying time, place, and manner test and stating that the regulation cannot burden substantially more speech than is necessary to further the government's interest. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.)

no *mens rea* requirement as this Court noted in its earlier order.

Also, nothing in the Fourth Circuit's opinion addresses this Court's concern that the statute is overbroad because it encompasses any delay in securing or providing "health care services" (as defined by the statute) that is occasioned by pure speech. *See Hoffman v. Hunt*, 845 F. Supp. 340, 344 (W.D.N.C. 1994). And nothing in the Fourth Circuit's opinion implicates this Court's judgment that the State statute has been applied in ways that violate the Plaintiffs' First Amendment rights such that enforcement of the statute must be enjoined until it is revised to prevent these abuses. In short, the Court does not believe that the Fourth Circuit's opinion in *American Life League* strongly implies that this Court's holding will be reversed because the Court believes that it is not difficult to see how the Act is substantially overbroad in relation to its legitimate scope of outlawing violence and barriers to access. *Cf. American Life League*, 47 F.3d at 653. Therefore the Court finds that the State has not made a strong showing that it will succeed on the merits.

B. Harm to the State.

According to the State, the people of North Carolina will be irreparably injured if this Court does not stay its judgment. Here, the State proffers the same list of violent behavior offered in its earlier briefing -- the murders, arson, and bombing that this Court has already described as reprehensible. But as this Court noted, the State has a wide variety of means that can be used to prevent and punish this sort of conduct. Also, it has not arrested any protestors under its statute -- it has just threatened the Plaintiffs with arrest. This undercuts any claim that the State statute is an essential weapon in its arsenal to combat the murders, trespass, and assault it has catalogued for the Court. Therefore, the Court finds that the State will not be irreparably harmed if the Court does not stay its judgment.

C. Harm to the Plaintiffs.

Although the State has not arrested anyone under its statute it has threatened the Plaintiffs with arrest and driven them from the sidewalks. These law-abiding citizens have been forced to accept the State's dictate given their need to earn a living or raise a family. Nonetheless, the State argues that because the Plaintiffs have not been arrested as of yet, they will not be harmed by any stay of this Court's judgment.

The State's argument in incredible. Apparently it believes that it can hold the state and federal laws over the heads of these protestors threaten them with arrest, and (quite literally) tell them to go home, without harming the Plaintiffs' First Amendment rights. Such a novel contention cuts against the whole grain of First Amendment case law and is utterly untenable. In contrast to the almost certain lack of harm to the State -- because it has other means to vindicate its interests -- the evidence in this case shows that the harm to Plaintiffs' First Amendment rights caused by the statute is certain and severe. The Court believes that a stay will cause substantial harm to the Plaintiffs.

D. The Public Interest.

It is difficult to weigh the public interests that are at issue in this dispute. The Plaintiffs seek to exercise their fundamental right to protest abortions and that right is deemed fundamental, at least in part, precisely because such protests are the means by which social progress is spurred and social evils are abated. Similarly, there can be no doubt that the State has a legitimate interest in preventing the murders, trespasses and assaults and other crimes that it has referenced. As this Court noted in its opinion, however, the State is obliged to craft a statute that respects the Plaintiffs fundamental rights. The evidence in this case conclusively establishes that the State statute is not well-tailored to achieve that end and that statute has been applied in the most egregious fashion. Given the wide variety of ways that the

State can address the lawless conduct it has described, and given the clear violations of the Plaintiffs' rights made possible by the statute, the Court finds that the public interest does not require a stay of this Court's judgment.

In conclusion, as Plaintiffs stated in their response to Defendants' motion for "a suspension of judgment pending appeal," it is well settled that the denial of First Amendment rights constitutes irreparable injury, citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673 (1976) and *Dombrowski v. Pfister*, 380 U.S. 429, 489, 85 S. Ct. 1116 (1965). This would be even more accurate when a State denies First Amendment rights under a manifestly unconstitutional statute.

II. Disposition of the Federal Government's Motion.

The Federal Intervenor has also moved for a stay of this Court's injunction pending its appeal. First, the Attorney General argues that she is likely to succeed on the merits of her appeal. Here, she argues that the Fourth Circuit's prior ruling in *American Life League, supra.* indicates that the Court of Appeals will reverse this Court's Commerce Clause holding. The Attorney General also relies on the Supreme Court's denial of *certiorari* in *American Life League, supra.* According to the Attorney General, the Supreme Court's denial of *certiorari* five months after its decision in *Lopez* indicates that nothing in *Lopez* undercuts the Fourth Circuit's opinion. The Attorney General also asserts that a stay is appropriate because the federal statute enjoys a presumption of constitutionality, and also, because the Seventh and Eleventh Circuits have held upheld the Act.

In addition, the Attorney General argues that the other factors this Court must consider require a stay of this Court's judgment. Thus, the Attorney General argues that the public will be irreparably harmed if she is not allowed to enforce F.A.C.E. because she will be unable to prevent the murder, assault, and trespass that has occurred around some clinics that provide abortions. The Attorney General also argues

that Plaintiffs will not be harmed by a stay because the record shows that the Plaintiffs' conduct is peaceable and does not violate the Act. According to the Attorney General, the public interest also favors a stay of this Court's judgment because Congress enacted the statute and the President signed the bill into law.

A. Likelihood of Success on Appeal.

The Court does not believe that the Attorney General has shown that she has a strong likelihood of success on the merits of her appeal. For one thing, the Attorney General's reliance upon the Supreme Court's denial of *certiorari* in *American Life League* is wholly misplaced because the denial of a writ cannot be treated as a summary affirmance -- as the Attorney General implies. *See Missouri v. Jenkins*, 115 S. Ct. 2038, 2047 (1995) ("the denial of writ of *certiorari* imports no expression of opinion on the merits of the case as the bar has been told many times). That the Supreme Court's denial of *certiorari* in *American Life League* cannot be treated as a summary affirmance is all the more certain when one considers that the Supreme Court expressly repudiated the mere affects formulation of the Commerce Clause test that was used by the Fourth Circuit in *American Life League*. *See Lopez*, 115 S. Ct. 1624, 1634 ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity `substantially affects' interstate commerce."); *cf. American Life League*, 47 F.3d 642, 647 ("A federal statute is valid under the Commerce Clause if . . . the regulated activity affects interstate commerce . . ."). And although the presumption of constitutionality is an equity to be considered in favor of the Government seeking relief from an enforcement of the statute, *see Walters v. N.A.R.A.*, 105 S. Ct. 11 (1984), that consideration clearly does not require relief in every case (otherwise no weighing would be necessary), and for the reasons given below the Court believes that the equities in this case counsel that the stay should not be granted. Finally, the Attorney General notes that the Eleventh and Seventh Circuits have accepted her

arguments, and so has the Eighth Circuit. *See U.S. v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996).[2] But this Court has considered the arguments of those opinions at length and found them unpersuasive. With all due respect for those courts, this Court has a definite and firm conviction that the Attorney General will not prevail on the merits of her appeal.

B. Irreparable harm.

The Attorney General has also argued that the people of North Carolina will be irreparably injured if this Court does not stay its judgment. Here, she references the list of behavior offered in her earlier briefing -- the murders, arson and bombings -- that this Court has already described as reprehensible. According to the Attorney General, she will be unable to prevent or punish this conduct, if she cannot enforce F.A.C.E.

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[2]The Court has reviewed the Eighth Circuit's opinion in *Dinwiddie, supra.* For the most part, that opinion tracks the analysis of the Eleventh and Seventh Circuits and this Court cannot accept those arguments for the reasons given in its earlier opinion. The court does note one significant difference: the Eighth Circuit is the first circuit to hold that F.A.C.E. is a valid exercise of Congress' authority to regulate persons or things in interstate commerce, the second category of activity Congress can regulate pursuant to the Commerce Clause consistent with *Lopez, see Dinwiddie*, 76 F.3d at 919-920, unlike the Seventh Circuit, which was unwilling to go that far. *See Wilson*, 73 F.3d 675, 686-688 (7th Cir. 1995) (*in dicta*). As noted, this Court finds that argument unpersuasive (none of the cases noted by the Supreme Court in *Lopez* support such a broad reading of the second category). But the Attorney General's need to make the argument is telling and, more importantly, the operation of F.A.C.E. is not limited to activities that reach persons or things in interstate commerce, which belies any effort to justify the statute on these grounds and dictates that any such effort must fail.

Undoubtedly, the Attorney General's concerns are understandable, but this Court believes that those concerns do not justify a stay pending appeal. As noted earlier, the State has a wide variety of means that can be used to prevent and punish the conduct that concerns the Attorney General, and there is no indication that the State is unwilling or unable to enforce these criminal laws against anyone who violates them. Further, if the State is confronted with a law enforcement emergency, the Attorney General may render assistance pursuant to 42 U.S.C. § 10501. Given the overlapping nature of these state-law protections, and the ability of the Attorney General to render assistance if the State is unable to prevent the harms which give rise to the Attorney General's legitimate concerns, the Court believes that no irreparable harm will be caused to the people of North Carolina by a refusal to stay the judgment. But the opposite is true with respect to the rights of the Plaintiffs.

C. Harm to the Plaintiffs

Although the State has not arrested anyone in North Carolina under the federal statute, there have been arrests in other states, *see e.g., U.S. v. Wilson*, 73 F.3d 675 (7th Cir. 1995), and the State has threatened the Plaintiffs with arrest and driven them from the sidewalks. As a result, these law-abiding citizens have been forced to accept the State's dictate given their need to earn a living or raise their families. In contrast to the almost lack of harm to the State and its citizens noted earlier, the evidence in this case shows that the harm to the Plaintiffs' First Amendment rights caused by the State's enforcement of F.A.C.E. is certain and severe. Under these circumstances, the Court finds that there is a substantial likelihood that the Plaintiffs will be further harmed if this Court stays its judgment pending appeal of this matter.

D. The Public Interest.

As noted earlier, it is difficult to weigh the public interests that are at issue in this dispute. The Plaintiffs seek to exercise

their right to protest abortions and that right is deemed fundamental. Similarly, there can be no doubt that the Attorney General's concerns are legitimate -- although this Court believes that the federal government has no general police power.

The Attorney General argues that the public interest weighs in favor of staying the judgment because Congress enacted the statute and the President signed the bill. Assuming that such an abstract interest in vindicating democratic government is relevant, the Court believes these concerns are counterbalanced by others that are equally abstract but no less important -- the preservation of individual liberty and the limited government created by the Constitution. More importantly, the Court believes it must determine the public interest with reference to the specific dispute at hand. Given the overlapping nature of these state-law protections, and the ability of the Attorney General to render assistance if the State is unable to prevent the harms which give rise to the Attorney General's legitimate concerns, the Court finds that the public interest does not require this Court to stay its judgment pending the appeal of this matter.

For these reasons, the motions of the State Defendants and the Federal Intervenors for a stay of this Court's judgment pending the appeal in this case are **DENIED**.

IT IS SO ORDERED this the 30th day of April, 1996.

/s/ Robert D. Potter
Robert D. Potter
Senior United States District Court Judge

APPENDIX J
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 96-1581(L)
CA-93-393-3-P

SHARON HOFFMAN; TRUDIE MATTHEWS; DIANE HOEFLING; RONNIE WALLACE, Reverend; JOHN BRADLEY, Reverend

Plaintiffs-Appellees

v.

JAMES B. HUNT, JR., Governor; STATE OF NORTH CAROLINA; D.R. STONE

Defendants-Appellants

and

CHARLOTTE-MECKLENBURG POLICE DEPARTMENT; UNITED STATES OF AMERICA

Defendants

[Filed May 31, 1996]

ORDER

United States of America has filed an emergency motion for stay pending appeal. James B. Hunt and the State of North Carolina have filed a motion for stay or suspension of judgment. Appellees have filed responses to the motions and the United States of America has filed a reply in support of its motion.

The Court grants the government's emergency motion

for stay pending appeal and also grants the State's motion for stay.

Entered at the direction of Judge Wilkins with the concurrence of Judge Russell and Judge Williams.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX K
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 96-1581
CA-93-393-3-P

SHARON HOFFMAN; TRUDIE MATTHEWS; DIANE HOEFLING; RONNIE WALLACE, Reverend; JOHN BRADLEY, Reverend

Plaintiffs-Appellees

v.

JAMES B. HUNT, JR., Governor; STATE OF NORTH CAROLINA;

Defendants-Appellants

and

D.R. STONE; CHARLOTTE-MECKLENBURG POLICE DEPARTMENT; UNITED STATES OF AMERICA

Defendants

- - - - - - - - - - - - - - -

AMERICAN MEDICAL WOMEN'S ASSOCIATION; FEMINIST MAJORITY FOUNDATION; MEDICAL STUDENTS FOR CHOICE; NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE; NATIONAL CENTER FOR PRO CHOICE MAJORITY; NATIONAL ORGANIZATION FOR WOMEN; NATIONAL WOMEN'S LAW CENTER; WOMEN'S LEGAL DEFENSE FUND; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED;

AMERICAN CIVIL LIBERTIES UNION; PLANNED PARENTHOOD OF THE TRIAD, INCORPORATED; PLANNED PARENTHOOD OF THE SOUTHERN PIEDMONT AND CAROLINA MOUNTAINS, INCORPORATED; UNITED STATES JUSTICE FOUNDATION; NORTH CAROLINA FAMILY POLICY COUNCIL; FOCUS ON THE FAMILY; FAMILY RESEARCH COUNCIL; PLANNED PARENTHOOD FEDERATION OF AMERICA, INCORPORATED; NATIONAL ABORTION FEDERATION

Amici Curiae

No. 96-1582
CA-93-393-3-P

SHARON HOFFMAN; TRUDIE MATTHEWS; DIANE HOEFLING; RONNIE WALLACE, Reverend; JOHN BRADLEY, Reverend

Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA

Defendant-Appellant

and

JAMES B. HUNT, JR., Governor; STATE OF NORTH CAROLINA; D.R. STONE; CHARLOTTE-MECKLENBURG POLICE DEPARTMENT

Defendants

PLANNED PARENTHOOD FEDERATION OF AMERICA,

INCORPORATED; AMERICAN MEDICAL WOMEN'S ASSOCIATION; FEMINIST MAJORITY FOUNDATION; MEDICAL STUDENTS FOR CHOICE; NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE; NATIONAL CENTER FOR PRO CHOICE MAJORITY; NATIONAL ORGANIZATION FOR WOMEN; NATIONAL WOMEN'S LAW CENTER; SOUTH CAROLINA NATIONAL ORGANIZATION FOR WOMEN; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED; AMERICAN CIVIL LIBERTIES UNION; PLANNED PARENTHOOD OF THE TRIAD, INCORPORATED; PLANNED PARENTHOOD OF THE SOUTHERN PIEDMONT AND CAROLINA MOUNTAINS, INCORPORATED; UNITED STATES JUSTICE FOUNDATION; NORTH CAROLINA FAMILY POLICY COUNCIL; FOCUS ON THE FAMILY; FAMILY RESEARCH COUNCIL

Amici Curiae

No. 96-1623
CA-93-393-3-P

SHARON HOFFMAN; TRUDIE MATTHEWS; DIANE HOEFLING; RONNIE WALLACE, Reverend; JOHN BRADLEY, Reverend

Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA

Defendant-Appellant

and

JAMES B. HUNT, JR., Governor; STATE OF

NORTH CAROLINA; D.R. STONE; CHARLOTTE-MECKLENBURG POLICE DEPARTMENT

Defendants

PLANNED PARENTHOOD FEDERATION OF AMERICA, INCORPORATED; AMERICAN MEDICAL WOMEN'S ASSOCIATION; FEMINIST MAJORITY FOUNDATION; MEDICAL STUDENTS FOR CHOICE; NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE; NATIONAL CENTER FOR PRO CHOICE MAJORITY; NATIONAL ORGANIZATION FOR WOMEN; NATIONAL WOMEN'S LAW CENTER; SOUTH CAROLINA NATIONAL ORGANIZATION FOR WOMEN; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED; AMERICAN CIVIL LIBERTIES UNION; PLANNED PARENTHOOD OF THE TRIAD, INCORPORATED; PLANNED PARENTHOOD OF THE SOUTHERN PIEDMONT AND CAROLINA MOUNTAINS, INCORPORATED; UNITED STATES JUSTICE FOUNDATION; NORTH CAROLINA FAMILY POLICY COUNCIL; FOCUS ON THE FAMILY; FAMILY RESEARCH COUNCIL

Amici Curiae

[Filed November 14, 1997]

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion

for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX L

1. **Commerce Clause, U.S. Const., art. I, § 8, cl. 3**

Section 8. [1] The Congress shall have Power . . . [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

2. **U.S. Const. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. **U.S. Const. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. **U.S. Const. amend. X**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

5. **U.S. Const. amend. XIV [excerpts]**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX M

1993 SESSION C. 412

The General Assembly of North Carolina enacts:

Section 1. Article 35 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"§ 14-277.4 Obstruction of health care facilities.

(a) No person shall obstruct or block another person's access to or egress from a health care facility or from the common areas of the real property upon which the facility is located in a manner that deprives or delays the person from obtaining or providing health care services in the facility.

(b) No person shall injure or attempt or threaten to injure a person who is or has been:

(1) Obtaining health care services;

(2) Lawfully aiding another to obtain health care services; or

(3) Providing health care services.

(c) A violation of subsection (a) or (b) of this section is a misdeameanor punishable by a fine of not more than five hundred dollars ($500.00), imprisonment not to exceed six months, or both. A second conviction for a violation of either subsection (a) or (b) of this section within three years of the first shall be punishable as a general misdemeanor. A third or subsequent conviction for a violation of either subsection (a) or (b) of this section within three years of the second or most recent conviction shall be punishable as a Class I felony.

(d) Any person aggrieved under this section may seek injunctive relief in a court of competent jurisdiction to prevent threatened or further violations of this section. Any violation of an injunction obtained pursuant to this section constitutes criminal contempt and shall be punishable by a term of imprisonment of not less than 30 days and no more than 12 months.

(e) This section shall not prohibit any person from engaging

in lawful speech or picketing which does not impede or deny another person's access to health care services or to a health care facility or interfere with the delivery of health care services within a health care facility.

(f) `Health care facility' as used in this section means any hospital, clinic, or other facility that is licensed to administer medical treatment or the primary function of which is to provide medical treatment in this State.

(g) `Health care services' as used in this section means services provided in a health care facility.

(h) Persons subject to the prohibitions in subsection (a) of this section do not include owners, officers, agents, or employees of the health care facility or law enforcement officers acting to protect real or personal property."

Sec. 2. G.S. 14-277.2(a) reads as rewritten:

"(a) It shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, funeral procession, picket line, or demonstration *upon any private health care facility or* upon any public place owned or under the control of the State or any of its political subdivisions to willfully or intentionally possess or have immediate access to any dangerous weapon. Violation of this subsection shall be a misdemeanor. It shall be presumed that any rifle or gun carried on a rack in a pickup truck at a holiday parade or in a funeral procession does not violate the terms of this act."

Sec. 3. This act becomes effective October 1, 1993.

In the General Assembly read three times and ratified this the 20th day of July, 1993.

APPENDIX N

Title 18 U.S.C. § 248. Freedom of access to clinic entrances

(a) Prohibited activities. --Whoever--

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. -- Whoever violates this section shall --

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense, and the fine shall,

notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. --

(1) Right of action. --

(A) In general. -- Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief.-- In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States.–

(A) In general. -- If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. -- In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent--

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(II) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General.--

(A) In general. -- If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. -- In any section under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. -- Nothing in this section shall be construed --

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit

any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. -- As used in this section:

(1) Facility. -- The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. – The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate -- The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. -- The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. -- The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(5) State. -- The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Supreme Court, U.S.
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No. 97-1322

IN THE

Supreme Court of the United States

October Term, 1997

SHARON HOFFMAN, TRUDIE MATTHEWS, DIANE HOEFLING, REVEREND RONNIE WALLACE, AND REVEREND JOHN BRADLEY,

Petitioners,

v.

JAMES B. HUNT, JR., GOVERNOR OF THE STATE OF NORTH CAROLINA, STATE OF NORTH CAROLINA, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED BY REVERSING THE JUDGMENT OF THE DISTRICT COURT AND HOLDING IN FAVOR OF DEFENDANTS ON THE GROUNDS THAT ACTS COMPLAINED OF BY PLAINTIFFS AS UNCONSTITUTIONAL APPLICATIONS OF N.C. GEN. STAT. § 14-277.4 WERE ACTUALLY ACTS OUTSIDE THE AUTHORITY GRANTED TO POLICE OFFICERS BY THAT STATUTE.

II. WHETHER N.C. GEN. STAT. § 14-277 4 IS UNCONSTITUTIONAL AS APPLIED.

LIST OF PARTIES

The names of all parties to the proceedings below are set forth in the caption of this case. Neither James B. Hunt, Jr., Governor of North Carolina, nor the State of North Carolina itself is a corporation. *See* Rule 29.6.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF JAMES B. HUNT, JR., and the STATE OF NORTH CAROLINA IN OPPOSITION

The Respondents, James B. Hunt, Jr., Governor of the State of North Carolina, and the State of North Carolina, respectfully request that this Court deny the petition for writ of

certiorari, seeking review of the United States Court of Appeals for the Fourth Circuit's opinion in this case. That opinion is reported at 126 F.3d 575 (4th Cir. 1997) (Petition A.1a - 27a).

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

In their original complaint, plaintiffs, who were at the time the complaint was filed private citizens of Mecklenburg County, North Carolina, challenged the constitutionality, both facial and as applied, of N.C. GEN. STAT. § 14.277.4, which prohibits obstruction of ingress to and egress from health care facilities. (App. pp. 22 *et seq.*) They sought declaratory relief holding the statute to be unconstitutional on its face and as applied; temporary, preliminary and permanent injunctive relief prohibiting enforcement of the statute; and attorneys' fees. (App. pp. 29-30) By their amended complaint, plaintiffs repeated their constitutional challenges to N.C. GEN. STAT. § 14-277.4 and made similar challenges to 18 U.S.C. § 248 -- the Federal Access to Clinic Entrances Act, or "FACE." (App. pp. 166 *et seq.*) They sought declaratory relief holding both statutes to be unconstitutional on their face and as applied; temporary, preliminary and permanent injunctive relief prohibiting enforcement of both statutes; and attorneys' fees. (App. pp. 173-74)

By his Judgment and Memorandum of Decision and Order entered April 1, 1996, and amended as to technical and typographical corrections on April 17, 1996, the Honorable Robert D. Potter held both N.C. GEN. STAT. § 14-277.4 and FACE to be "invalid and unconstitutional," and enjoined enforcement of both statutes. (App. pp. 471 *et seq*; Petition A.28a-94a) Judge Potter found, *inter alia*, that N.C. GEN. STAT. § 14-277.4 was vague and overbroad, and therefore violative of the First Amendment, and found the statute

unconstitutional as applied to plaintiffs. (Petition A.45a-52a, 93a) He further held that Congress lacked authority under the Commerce Clause and the Fourteenth Amendment to enact FACE, and found that FACE violates the First Amendment. (Petition A. 52a-90a, 94a)

All defendants appealed to the United States Court of Appeals for the Fourth Circuit. A unanimous panel of the Court of Appeals, by a decision reported at 126 F.3d 575 (4th Cir. 1997) (Petition A.1a - 27a), reversed the District Court. On November 14, 1997, the Court of Appeals denied petitioners' petition for rehearing and suggestion for rehearing *en banc*.

B. Factual Background.

N.C. GEN. STAT. § 14-277.4, which became effective October 1, 1993, prohibits obstruction of ingress to and egress from health care facilities. (Petition A. 155a-156a) Plaintiffs are persons who are opposed to abortion on moral, ethical, scientific and religious grounds and who have engaged and wish to continue engaging in protest activity -- including marches, leafleting, display of signs and placards, and conversing with individuals -- at abortion clinics. (Complaint ¶¶ 10-11, App. p. 25; Amended Complaint ¶¶ 10-11, App. pp. 168-69; Transcript of February 2, 1992, hearing, pp. 42-44, 57-58, 60, 69-70, 88-89, App. pp. 347-349, 362-63, 365, 374-75, 393-94.) At the hearing on February 2, 1996, plaintiffs offered evidence that could tend to show that police officers of the City of Charlotte have threatened them with arrest when they have engaged in protest activities at abortion clinics and have, at one time or another, given them differing and conflicting interpretations of N.C. GEN. STAT. § 14-277.4. (Transcript of February 2, 1996, hearing, pp. 9-30, 35-36, 45-53, 58-65, 71-

78; App. pp. 314-335, 340-341, 350-358, 363-370, 376-383). Plaintiffs' evidence also showed, however, that police officers were also attempting to enforce other statutes and ordinances at demonstrations at abortion clinics, and that plaintiffs were frequently confused as to which statute or ordinance the police were attempting to enforce in specific situations. (Transcript of the February 2, 1996, hearing, pp. 66-68, 74-75; App. pp. 371-73, 379-80.) The evidence was unequivocal, however, that none of the plaintiffs has ever been arrested for, charged with, or convicted of violation of N.C. GEN. STAT. § 14-277.4. (Transcript of the February 2, 1996, hearing, pp. 40, 55, 68, 81, 89; App. pp. 345, 360, 373, 386, 394.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS HAVE FAILED TO ESTABLISH THAT APPROPRIATE GROUNDS FOR GRANTING A WRIT OF CERTIORARI EXIST IN THIS CASE.

In their petition, petitioners urge that a writ of certiorari should be granted because the "ruling of the Fourth Circuit is so extreme, perverse, and contrary to this Court's settled precedent that it warrants summary reversal." (Petition, p. 14) Petitioners continue by arguing that, "[i]n the alternative, this Court should grant plenary review to redress the serious doctrinal confusion the decision below will spawn." (*Id.*) Petitioners, however, have failed to demonstrate that appropriate grounds for granting a writ of certiorari exist in this case.

Pursuant to Rule 10.1(a) of the Rules of the Supreme Court:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers;
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

None of these criteria apply to this petition. Of these criteria, only the last one can even reasonably be considered to have been raised by petitioners. Petitioners are wrong, however, in asserting that the decision of the Court of Appeals "is so extreme, perverse, and contrary to this Court's settled precedent that it warrants summary reversal" or that "serious doctrinal confusion" will result from the decision below.

Indeed, the decision below is in complete accord with the established precedent of this Court. The Court of Appeals, in addressing petitioners' contention that N.C. GEN. STAT. § 14-

277.4 had been unconstitutionally applied to them, noted that "we need not reach the constitutional question if there exists an alternative, nonconstitutional basis for our decision." *Hoffman v. Hunt,* 126 F.3d 575, 582 (4th Cir. 1997) (Petition A.13a). Citing *Peters v. Hobby,* 349 U.S. 331 (1955) (where this Court examined whether action taken by a loyalty review board was consistent with the power granted that board before considering whether the board's action was constitutional), the court stated that, "before deciding whether application of [N.C. GEN. STAT.] § 14-277.4 to protected free speech would violate the First Amendment, we first determine whether the statute permits such application." (*Id.*) The court then determined that the actions in which petitioners had engaged, and which they argued had led to threats of arrest, were not prohibited by N.C. GEN. STAT. § 14-277.4, and that

> [b]ecause law enforcement officers exceeded their authority in threatening Plaintiffs with arrest for activities that did not violate [N.C. GEN. STAT.] § 14-277.4, we need not determine whether these threats also contravened the First Amendment.

Hoffman, 126 F.3d at 582 (Petition A.13a-14a).

The approach of determining issues on nonconstitutional grounds before considering constitutional questions is well established in the precedence of this Court. *See Peters,* 349 U.S. at 338. *See also Clinton v. Jones,* ___ U.S. ___, ___, 117 S.Ct. 1636, 1642 (1997) (Court has often stressed the importance of avoiding the premature adjudication of constitutional questions, and this doctrine of avoidance is

applicable to the entire federal judiciary); *Lambrix v. Singletary*, ___ U.S. ___, ___, 117 S.Ct. 1517, 1523 (1997) (issues of procedural bar should be considered prior to consideration of constitutional issues because "[c]onstitutional issues are generally to be avoided"); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"). Petitioners' contentions that the decision below, then, is "pernicious" or "perverse," or that it will "spawn" "serious doctrinal confusion," are specious at best. Petitioners have utterly failed to demonstrate "compelling reasons" for review of the decision below, just as they have failed to demonstrate that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10.1(a) of the Rules of the Supreme Court. The petition for a writ of certiorari should accordingly be denied.

II. THE COURT OF APPEALS DID NOT ERR IN REVERSING THE DISTRICT COURT'S DECISION THAT N.C. GEN. STAT. § 14-277.4 HAS BEEN UNCONSTITUTIONALLY APPLIED TO PETITIONERS.

Petitioners argue that the Court of Appeals erred by reversing the District Court's decision that the provisions of N.C. GEN. STAT. § 14-277.4 have been unconstitutionally applied to them. Petitioners contend that the court misconstrued the distinction between facial constitutional challenges and "as applied" challenges, and that in so doing, the

court engaged in "Alice in Wonderland jurisprudence." (Petition, p. 14) It is petitioners, however, who have misapprehended both the law and the decision of the Court of Appeals.

Initially, it should be noted that petitioners have not sought review of the Court of Appeals' decision that N.C. GEN. STAT. § 14-277.4 is constitutional on its face and is neither vague nor overbroad. *Hoffman v. Hunt,* 126 F.3d 575, 581-82 (4th Cir. 1997) (Petition A.9a-12a). That issue, therefore, is not before this Court.

Also, it should be noted that petitioners are incorrect when they state that "there is simply no dispute that the challenged statute, N.C.G.S. § 14-277.4, has been applied in a flagrantly unconstitutional manner." Respondents have disputed this throughout the proceedings of this case, and indeed specifically so argued before the Court of Appeals, the court's statement to the contrary notwithstanding. *Hoffman,* 126 F.3d at 582 (Petition, p. 13, A.12a) While it is undisputed that law enforcement officers threatened petitioners with arrest as they have described, there is a dispute as to whether the officers did so to enforce the provisions of N.C. GEN. STAT. § 14-277.4. The record in this case shows confusion as to exactly which law the police officers were attempting to enforce when they told the plaintiffs that certain actions could lead to arrest. While the district court assumed that all communications coming from police officers were attempts to enforce N.C. GEN. STAT. § 14-277.4, petitioners' own evidence showed that police officers were attempting to enforce both N.C. GEN. STAT. § 14-277.4 and the Charlotte parade and picketing ordinance at demonstrations at abortion clinics. (Transcript of

the February 2, 1996, hearing, pp. 66-68, 74-75; App. pp. 371-73, 379-80.) Accordingly, the State did and does disagree with petitioners' assertion that the record clearly establishes that threats of arrest against them were made solely to enforce the provisions of N.C. GEN. STAT. § 14-277.4.

Similarly, petitioners mischaracterize the decision of the Court of Appeals for the Fourth Circuit. Petitioners argue that

> [b]y holding the threats of arrest to be *illegal* as well as unconstitutional, the court simply found an additional reason to grant petitioners relief on their "as applied" challenge. To *deny* relief against the threatened arrests because those arrests were *illegal* is Alice in Wonderland jurisprudence.

(Petition, pp. 13-14, emphasis original.) The court below, however, did not find "the threats of arrest to be illegal as well as unconstitutional." Indeed, the Court of Appeals, properly applying the well established principal that questions should, if possible, be decided on nonconstitutional grounds, specifically declined to consider whether the threats of arrest amount to unconstitutional applications of N.C. GEN. STAT. § 14-277.4. *Hoffman*, 126 F.3d at 582 (Petition A. 13a-14a). *See also Clinton v. Jones*, ___ U.S. ___, ___, 117 S.Ct. 1636, 1642 (1997); *Lambrix v. Singletary*, ___ U.S. ___, ___, 117 S.Ct. 1517, 1523 (1997); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944). The court did this because it had determined that law enforcement officers exceeded their authority by threatening arrest under N.C. GEN. STAT. § 14-277.4 for acts not prohibited by that statute. *Hoffman*, 126 F.3d

at 582 (Petition A. 13a-14a). Because, then, the threats of arrest could be invalidated as *ultra vires*, there was no need to determine whether they were also unconstitutional. *Id.*

For this same reason, petitioners misunderstand the opinion of the Court of Appeals when they argue that the court "collapsed the 'facial' and 'as applied' challenges into one." (Petition. p. 14) The Court of Appeals did not fail to recognize the difference between a facial challenge and an "as applied" one, nor does the court's opinion lead to the conclusion that any statute that is found to be facially valid will also survive an "as applied" challenge, because "any unconstitutional application automatically is a misapplication of the statute." (*Id.*) Rather, the Court of Appeals recognized that, in this particular case, the specific threats of arrest put forth by petitioners did not constitute violations of N.C. GEN. STAT. § 14-277.4, and that such threats therefore exceeded the authority conferred by that statute. Accordingly, the court in this instance could properly avoid determining a constitutional question because a nonconstitutional basis existed by which the court could resolve the issues before it.

The court below held that N.C. GEN. STAT. § 14-277.4 "is not violated by peaceful protest activity that does not physically obstruct or block access to or egress from a health care facility." *Hoffman*, 126 F.3d at 582 (Petition A. 13a). This holding establishes that law enforcement officers may not threaten petitioners or any other persons with arrest pursuant to N.C. GEN. STAT. § 14-277.4 for any conduct that does not physically prevent another from entering or leaving a health care facility. This holding further establishes that the specific threats complained of by petitioners, assuming they were

indeed made pursuant to N.C. GEN. STAT. § 14-277.4, which respondents do not concede, were improper and unsustainable. Petitioners, then, have hardly been denied relief as to these threats of arrest. Rather, they simply have been accorded relief on nonconstitutional grounds. Issuance of the Court's writ of certiorari to review this issue is, therefore, inappropriate and unnecessary.

CONCLUSION

For these reasons, the petition for writ of certiorari as to petitioners' challenges to N.C. GEN. STAT. § 14-277.4 should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

SHARON HOFFMAN, ET AL., PETITIONERS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress lacked authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), 18 U.S.C. 248.

2. Whether the Access Act is an unconstitutional viewpoint-based restriction on speech.

3. Whether the Access Act is unconstitutionally overbroad or vague.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1322

SHARON HOFFMAN, ET AL., PETITIONERS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 126 F.3d 575. The opinion of the district court (Pet. App. 28a-92a) is reported at 923 F. Supp. 791.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1997. A petition for rehearing was denied on November 14, 1997 (Pet. App. 148a-152a). The petition for a writ of certiorari was filed on February 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (Access Act or FACE), Pub. L. No. 103-259, 108 Stat. 694, 18 U.S.C. 248, in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). From 1977 through April 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. *Ibid.*; H.R. Rep. No. 306, 103d Cong., 1st Sess. 6 (1993) (H.R. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. S. Rep. 3, 6; H.R. Rep. 6-7; H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994) (Conf. Rep.). That violence endangered the lives of, and inflicted injuries on, physicians, clinic staff and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. S. Rep. 5.

Groups opposed to abortion organized blockades designed to bar access to health care facilities where abortions were performed and to overwhelm local law enforcement. S. Rep. 7; H.R. Rep. 7. From 1977 through April 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. S. Rep. 7; H.R. Rep. 7. Providers of abortions also received numerous death threats. S. Rep. 10.

Violence and blockades aimed at abortion providers and facilities have occurred in at least 28 States, the District of Columbia, and dozens of cities across the

country. S. Rep. 12. Many of these activities have been organized nationwide and directed across state lines. *Id.* at 13; H.R. Rep. 9. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. 31. Many patients who seek abortion services travel across state lines to obtain services, and clinic employees sometimes travel across state lines to work. *Ibid.*

The declared purpose and the effect of the violent and obstructive activities have been to inhibit women's access to safe and legal abortion services. S. Rep. 11 & n.22. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and by closing clinics. *Id.* at 11, 17. The evidence before Congress demonstrated that the campaign to eliminate abortion services through violence and obstruction was succeeding and had forced many clinics to close. *Id.* at 14, 17, 31; H.R. Rep. 8-9.

Congress found that the violent and obstructive conduct burdens interstate commerce by

> interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

Conf. Rep. 7; see also S. Rep. 14, 17, 31-32. Congress found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. *Id.* at 19-21; H.R. Rep. 6, 10.

The Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; * * * [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services.

18 U.S.C. 248(a). The statute defines "intimidate" as "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. 248(e)(3).

The Act specified, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. 248(d)(1).

2. *Factual and Procedural Background*

a. Petitioners are abortion opponents who have engaged in nonviolent demonstrations outside reproductive health facilities in North Carolina where abortions are performed. Pet. App. 5a-6a. On December 6, 1993, petitioners brought suit against the State

of North Carolina and its governor, a local police department, and a local law enforcement official, challenging the constitutionality of a North Carolina statute criminalizing obstruction of access to, or egress from, health care facilities, and seeking a declaratory judgment and injunctive relief. The police department and local official were later dismissed from the case. Petitioners eventually amended their complaint to add a challenge to the constitutionality of Section 3 of the then newly enacted Access Act, 18 U.S.C. 248(a)(1). *Id.* at 6a. Petitioners alleged that Congress lacked authority to enact the Access Act under the Commerce Clause or Section 5 of the Fourteenth Amendment, and that the Act violates the First Amendment. *Ibid.* The Attorney General of the United States was notified, pursuant to 28 U.S.C. 2403(c), of the challenge to the constitutionality of a federal statute and the United States was granted leave to intervene. Pet. App. 6a-7a n.4.

The district court initially stayed consideration of the case pending the decision of the Fourth Circuit in *American Life League, Inc.* v. *Reno*, 47 F.3d 642, cert. denied, 516 U.S. 809 (1995), and then ordered additional briefing in light of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). Pet. App. 7a.

Following an evidentiary hearing with respect to the enforcement of the North Carolina statute, the district court permanently enjoined enforcement of the state and federal statutes. Pet. App. 7a-8a. As is relevant here, the district court invalidated the Access Act on two principal grounds.[1] First, the

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[1] The district court also held that the state statute was impermissibly vague and overbroad and had been applied to

district court held that the statute violates the Commerce Clause because it regulates protest activity, which does not substantially affect interstate commerce. See Pet. App. 55a-83a. The district court concluded (Pet. App. 56a n.5) that it was not bound by the Fourth Circuit's rejection of an identical challenge in *American Life League, Inc.* v. *Reno*, 47 F.3d 642, cert. denied, 516 U.S. 809 (1995), in light of this Court's intervening decision in *United States* v. *Lopez*. The district court reasoned that, under *Lopez*, Congress's power to regulate under the Commerce Clause extends only to commercial or economic activities, which do not include "the [petitioners'] protest activities." Pet. App. 70a-72a. The district court acknowledged that its ruling was in conflict with post-*Lopez* decisions in *Cheffer* v. *Reno*, 55 F.3d 1517 (11th Cir. 1995), and *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996), which did not read *Lopez* to limit Congress's commerce power to strictly commercial activities,

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petitioners in an unconstitutional manner. Pet. App. 45a-52a. The court of appeals reversed, agreeing with respondent North Carolina that its statute is neither vague nor overbroad. *Id.* at 9a. The court held that, to the extent law enforcement officers had threatened petitioners with arrest for activities that did not violate the state statute, the state statute did not permit such an application, so that the threats of arrest were invalid because *ultra vires* and the question of the constitutionality of the state statute's application therefore need not be reached. *Id.* at 13a. The United States did not address in the courts below any of the issues relating to the state statute. Respondent North Carolina has filed a brief opposing petitioner's contention (Pet. 12-14) that the Court should review the validity of the state statute as applied. Resp. State Br. in Opp. 4-11. We therefore discuss in this brief only the issues regarding the federal statute.

and which found, in any event, that reproductive health services constitute commercial activity amenable to regulation under the commerce power. Pet. App. 72a, 77a-78a. The district court further held that, even if Congress could regulate noncommercial activities under the Commerce Clause, the impact of protest activities on interstate commerce is "trivial or merely incidental," rather than substantial. *Id.* at 76a. The district court also found the Access Act void under *Lopez* because it lacks a jurisdictional element that requires a case-by-case inquiry regarding an explicit effect on interstate commerce. *Id.* at 79a.[2]

Second, the district court held that the statute reaches speech that cannot be regulated consistent with the First Amendment. The district court found that the Fourth Circuit's decision in *American Life League*, holding that the Access Act was not unconstitutionally vague or overbroad or an impermissible viewpoint based restriction, did not resolve all of petitioners' claims. Pet. App. 86a-87a. The district court found that the Access Act violates the First Amendment because its prohibition against "intimidat[ion]," as defined by the statute, impermissibly "hinges on the subjective reaction that speech elicits from its listener," and reaches beyond the restriction of "fighting words" and allows parties to sue based on their apprehension that the speaker threatens bodily harm to himself or another, and is therefore overbroad. *Id.* at 89a-90a.

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[2] The district court also rejected the argument that Section 5 of the Fourteenth Amendment provides an independent constitutional basis for the Act on the ground that Section 5 applies only to state action. Pet. App. 83a-85a.

b. The court of appeals reversed. Pet. App. 1a-27a. As is relevant here, the court stated that its prior opinion in *American Life League* survived the ruling in *United States* v. *Lopez* because the activity regulated by the Access Act—the use of force, threat of force, or physical obstruction to intentionally injure, intimidate, or interfere with persons because they are or have been obtaining or providing reproductive health services—"while not itself economic or commercial, is closely and directly connected with an economic activity." *Id.* at 23a. The court found that congressional reports accompanying the Act indicate that "many women travel across state lines to obtain reproductive health care, that facilities providing these services retain staff in an interstate employment market and utilize supplies obtained through interstate commerce, and that some reproductive health care facilities that had been the targets of the activities regulated by FACE had been forced to discontinue the provision of services." *Id.* at 23a-24a. The court concluded that because of "[t]he real and substantial connection between the conduct regulated by FACE and the interstate commercial market in reproductive health care services," the Act is a valid exercise of congressional power, under the line of authority reaffirmed in *Lopez*, "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 24a (quoting *Lopez*, 514 U.S. at 561). The court noted that all the other circuits that have considered the constitutionality of the Access Act under the Commerce Clause in the wake of *Lopez*

have uniformly upheld the statute as constitutional. *Id.* at 24a-25a n.8 (citing cases).[3]

The court of appeals likewise rejected petitioners' First Amendment challenges, finding that the plain language of the Act prohibits conduct only "that by force or physical obstruction injures, interferes with, or intimidates the provider or recipient of reproductive health care or speech that amounts to a threat of force that obstructs, injures, intimidates, or interferes with the provider or recipient of reproductive health care." Pet. App. 26a. "The regulation of neither the former conduct, nor the latter speech, is violative of the First Amendment." *Ibid.* (citing, *inter alia*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992)).

ARGUMENT

Petitioners contend that Congress lacked authority under the Commerce Clause to enact the Access Act (Pet. 16-22), and that the statute violates the First Amendment (Pet. 22-30). Petitioners' arguments are substantially similar to arguments raised in several petitions for writs of certiorari that the Court has previously denied: *American Life League, Inc.* v. *Reno*, 47 F.3d 642 (4th Cir.), cert. denied, 516 U.S. 809 (1995); *Woodall* v. *Reno*, 47 F.3d 656 (4th Cir.), cert. denied, 515 U.S. 1141 (1995); *United States* v. *Soderna*, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); *United States* v. *Dinwiddie*, 76 F.3d

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[3] In light of that ruling, the court of appeals declined to address the United States' alternative arguments that Congress possessed authority to enact the Access Act to protect persons or things in interstate commerce under the second category of Commerce Clause powers or under Section 5 of the Fourteenth Amendment. Pet. App. 25a n.9.

913 (8th Cir.), cert. denied, 117 S. Ct. 613 (1996); *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996); and *Terry* v. *Reno*, 101 F.3d 1412 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 2431 (1997). The Court should deny review in the instant case for the same reasons. The decision of the court of appeals is correct and does not merit further review.[4]

1. The decision below is wholly consistent with the Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). Contrary to petitioner's claim (Pet. 16-22), the activities regulated by the Access Act substantially affect interstate commerce, as required by *Lopez*.

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 514 U.S. at 558-559. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 558. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities

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[4] Petitioners acknowledge (Pet. 15 n.7) that there is no disagreement among the federal courts of appeals regarding the constitutionality of the Access Act. All the federal courts of appeals that have considered constitutional challenges to the Access Act have upheld the validity of the Act. Petitioners also acknowledge (Pet. 15 n.7) that at least half a dozen district courts have held that the Act survives constitutional scrutiny. Petitioners nonetheless contend that the overruled opinions of the district court in this case and one other case and the dissenting views of two court of appeals judges persuasively demonstrate that the Access Act is unconstitutional. Pet. 15 n.7 (citing cases). Those opinions do not create a conflict warranting review by this Court.

that substantially affect interstate commerce." *Id.* at 559.

The court of appeals correctly held that the Access Act is a valid exercise of Congress's power to regulate "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 559.[5] Congress is empowered to regulate conduct that "substantially affects" interstate commerce when considered in the aggregate. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (internal quotation marks and emphasis omitted) (upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one ophthalmologist affects interstate commerce).

Congress had a rational basis for concluding that the violent and obstructive activities prohibited by the Access Act "substantially affect interstate commerce" by their adverse impact on clinics and other providers of reproductive health services who are involved in interstate commerce:

> Clinics and other abortion service providers clearly are involved in interstate commerce, both

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[5] The Access Act is also a proper exercise of Congress's power, under the Commerce Clause, to regulate or to protect "persons or things in interstate commerce," *Lopez*, 514 U.S. at 558, and under Section 5 of the Fourteenth Amendment. Because the court of appeals did not reach these questions (see note 3, *supra*), we do not discuss them further.

> directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. 31. Also, many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another," "[c]linic employees sometimes travel across State lines to work as well," and "some doctors who perform abortions work in facilities in more than one State." *Ibid.*

The violent and obstructive conduct proscribed by the Access Act substantially interferes with such interstate commerce. The prohibited conduct disrupts the sale of services and goods, the employment of personnel and generation of income, the purchase and lease of facilities and equipment, and the purchase of medicine and supplies from other States. Conf. Rep. 7; S. Rep. 14, 17, 31; H.R. Rep. 8-9. Activity prohibited by the Act forced some clinics to close, caused millions of dollars in damages to others, impeded the interstate movement of people and goods, contributed to a nationwide shortage of reproductive health services, and threatened to eradicate those commercial services from the national market. S. Rep. 3, 5, 17, 31; H.R. Rep. 8. Extensive evidence that interference with abortion services is a problem of national scope further buttressed Congress's conclusion that the proscribed conduct has a substantial aggregate effect on interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of racial dis-

crimination supported Congress's conclusion that it substantially affected interstate commerce).

Nothing in *Lopez* calls into question the holding of the court of appeals. The Court in *Lopez* struck down the provision of the Gun Free School Zones Act, 18 U.S.C. 922(q)(1)(A), that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561; *id.* at 580 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that the possession of an otherwise lawful firearm in a school zone bears such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce. *Id.* at 564, 567. The Court also noted the absence of evidence or congressional findings demonstrating that the regulated conduct substantially affects interstate commerce. *Id.* at 562-563.

The Access Act differs markedly from the Gun Free School Zones Act. The Access Act "by its terms" directly addresses "commerce" and "economic enterprise[s]." *Lopez*, 514 U.S. at 561. It prohibits interference with commercial enterprises and with persons because they are engaging in commerce (*i.e.*, providing or obtaining the commercial service of reproductive health care). Unlike in *Lopez*, where neither the prohibited conduct (possession of a gun near schools) nor its immediate effect (potential increase in violence in schools) was commercial, here the immediate effect of the prohibited conduct is obstruction of commercial transactions. In addition, in contrast to *Lopez*, the effect of physical obstruc-

tion of reproductive health service facilities on interstate commerce is direct: it interferes with persons, things, and the provision of services in interstate commerce and threatens in the aggregate to eliminate abortion services from the national commerce. S. Rep. 3. Also, the Access Act, unlike the Gun Free School Zones Act as originally adopted, is supported by a legislative record containing abundant evidence and specific findings by Congress showing that the proscribed conduct substantially impedes interstate commerce—findings to which the courts must defer. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

The *Lopez* Court reaffirmed that Congress's commerce power extends to activities that *either* "arise out of *or* are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. at 561 (emphasis added). Indeed, nothing in that decision questions the power of Congress to prohibit the use, as distinguished from the mere possession, of firearms in certain situations. Here, the conduct proscribed by the Act is undoubtedly "connected with a commercial transaction" because it interferes with persons who are providing or obtaining a particular commercial service (*i.e.*, reproductive health care).

2. Nor does the Access Act discriminate against abortion opponents in violation of the First and Fifth Amendments to the United States Constitution. Contrary to petitioners' claim (Pet. 22-30), the Act does not single out abortion opponents for selectively harsh treatment, nor does it constitute a viewpoint-based ban on speech.

a. The Access Act regulates conduct, not speech. The Act does not prohibit speech—including speech that strongly opposes abortion—in the immediate vicinity of facilities that provide abortions. Instead, it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. As this Court has made clear, such conduct is outside the scope of First Amendment protection. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to a building); *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute forbidding unreasonable interference with access to buildings). Congress may proscribe such activities, even when they are designed to communicate a message, because they "produce special harms distinct from communicative impact." *Mitchell*, 508 U.S. at 484-485 (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984)).

The Access Act is viewpoint neutral because it "serves purposes unrelated to the content of the expression." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The Act is justified, not by reference to the viewpoint of any expression it may incidentally affect, but by the need to protect interstate commercial transactions, to protect women who seek to exercise their constitutional right to reproductive choice, and to maintain public safety and order. Access Act, § 2 (Purposes), 18 U.S.C. 248 note. Those interests are unrelated to any expressive content the

forbidden conduct may have. The Act permits the expression of any message, including a message of hostility to abortion.

Petitioners argue (Pet. 24-27) that the Access Act is viewpoint-based because it proscribes certain activities only when the person acts because another person is seeking to obtain or provide reproductive health services, or because a facility provides such services. See 18 U.S.C. 248(a)(1) and (3). This requirement concerns the motive of a violator, not the message that person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993).

The Access Act does not target persons because they have an anti-abortion viewpoint. The Act does not limit its protection to "abortion clinics"; rather, it prohibits interference with persons because they are providing or obtaining "services relating to pregnancy," including counseling that an anti-abortion group might give to a pregnant woman to urge her *not* to have an abortion, and medical care to assist women in carrying their pregnancies to term. 18 U.S.C. 248(e)(5). The use of force or physical obstruction to blockade a facility providing such services violates the Act to the same extent as a blockade of a facility offering abortion services. The Act targets intentional interference with any reproductive health service, regardless of the perpetrator's views about abortion. For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular abortion; the use of force or obstruction to achieve that end would violate the Act.

b. Even if the conduct prohibited by the Access Act had sufficient expressive content to implicate the First Amendment, which it does not, the Act would easily survive scrutiny under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (1) serves substantial governmental interests, (2) restricts conduct for reasons unrelated to its expressive content, and (3) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves substantial and legitimate governmental interests, including protecting interstate commercial transactions, preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. And, as we have explained above, those interests are unrelated to any expressive content the forbidden conduct may have.

The fact that, in practice, the majority of persons who wish to engage in conduct that would violate the Access Act may be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility towards the Vietnam war. The law was nonetheless held constitutional because it proscribed conduct without regard to any intended or unintended message. The Access Act similarly proscribes obstructive, threatening, and violent conduct, without regard

to the viewpoint of the violator or content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. It is carefully drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care. The Act does not restrict the ability of abortion opponents to communicate with their desired audience. The statute permits speech, signs, prayers, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered facilities and regardless of the content of the speech. *American Life League*, 47 F.3d at 648.

This Court's decisions in *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994), and *Schenck* v. *Pro-Choice Network of Western New York*, 117 S. Ct. 855 (1997), support the Access Act's constitutionality. In *Madsen*, a state court enjoined certain anti-abortion protestors who had engaged in specific protests outside a particular health clinic from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act—interfering with access to, ingress into, and egress from the clinic; and physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic, or harassing, intimidating or threatening any employee of the clinic. See 512 U.S. at 759-761. The Court upheld those aspects of the injunction, concluding that those restrictions were content neutral, that they were unrelated to the defendants' message, and that any effect on expression was incidental to the government's regulation of threatening conduct. *Id.*

at 762-764, 768-770, 772. Similarly, in *Schenck*, the Court upheld certain provisions in a preliminary injunction that banned demonstrating within fixed 15-foot buffer zones around clinic doorways, driveways, and driveway entrances. 117 S. Ct. at 868-869. The Court reaffirmed *Madsen*, and ruled that the fixed buffer zone limitations were valid because they were justified by significant government interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services, and were appropriately tailored to serve those interests. *Id.* at 866, 868-869.

3. The Access Act is neither unconstitutionally vague nor overbroad. Petitioners challenge as vague a series of statutory terms (Pet. 27-29), but in fact each of them gives people of ordinary intelligence "a reasonable opportunity to know what is prohibited." *Schenck*, 117 S. Ct. at 870 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). For example, "physical obstruction," is defined by the Act to mean

> rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous.

18 U.S.C. 248(e)(4). That provision is almost identical to one the Court upheld against a vagueness challenge in *Cameron* v. *Johnson*, 390 U.S. 611 (1968). That case concerned a Mississippi law that made it a crime for

> any person, singly or in concert with others, to engage in picketing or mass demonstrations in

> such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from [specified buildings].

Id. at 612 n.1. As in *Cameron*, the statute here "clearly and precisely delineates its reach in words of common understanding." *Id.* at 616.

The Act similarly defines other statutory terms in words of common understanding: "interfere with" means "to restrict a person's freedom of movement" (18 U.S.C. 248(e)(2)), "intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another" (18 U.S.C. 248(e)(3)). In light of the statute's explicit definition of various terms and its plainly legitimate sweep, the court of appeals correctly concluded that the statute is not overly broad or vague.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES
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-v-

JAMES B. HUNT, JR., Governor of the State of North Carolina, STATE OF NORTH CAROLINA, AND UNITED STATES OF AMERICA,

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REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

The petition for certiorari seeks review of two aspects of the Fourth Circuit's ruling below: first, its decision upholding a state statute, N.C. Gen. Stat. § 14-277.4, as applied; and second, its ruling upholding a federal statute, 18 U.S.C. § 248, on its face. The state and federal defendants have filed separate briefs in opposition, which petitioners address herein.

I. THIS COURT SHOULD GRANT REVIEW OF PETITIONERS' "AS APPLIED" CHALLENGE TO N.C.G.S. § 14-277.4.

The undisputed evidence and the findings of the district court "confirmed in disturbing detail," Pet. App. 46a, that petitioners were repeatedly threatened with arrest under the North Carolina "access" statute, N.C.G.S. § 14-277.4, for doing no more than peacefully picketing, leafletting, and sidewalk counseling on public rights of way outside abortion businesses in Charlotte, North Carolina. See Pet. at 2-6, 8; Pet. App. 32a-44a. The court of appeals expressly agreed that "the uncontroverted evidence shows that law enforcement officers have threatened [petitioners] with arrest under the statute for engaging in constitutionally protected activities." Pet. App. 12a.

> For example, individuals have been threatened with arrest for attempting to distribute literature to persons entering clinics. . . . On another occasion, a protestor was informed that her mere presence -- and the presence of other picketers -- violated the statute because patients were rescheduling their appointments. . . . [T]he record provides no indication that the activities in which [petitioners] engaged physically obstructed or blocked access to or egress from health care facilities.

Id. The North Carolina respondents did not put on any

contrary evidence in the district court. Pet. App. 31a, 41a. In this Court they do no more than cite evidence that suggests that one witness may have been confused, on one occasion, about whether a city ordinance or the challenged state statute was being enforced. See N.C. Br. in Opp. (hereafter "N.C. Opp.") at 4, 8-9. These respondents made no effort to call into question the overwhelming remainder of the evidence of unconstitutional enforcement of N.C.G.S. § 14-277.4.

The Fourth Circuit, faced with a mountain of undisputed evidence that the state statute had been enforced in an unconstitutional manner, nevertheless elected to decide an alternative, nonconstitutional question: whether the threats of arrest which petitioners faced under the challenged statute were legally authorized by that statute. Pet. App. 13a. The court held that the threats of enforcement were unauthorized, i.e., illegal, wholly aside from any possible unconstitutionality. Pet. App. 13a-14a.

The North Carolina respondents, pointing to this holding, urge that the Fourth Circuit simply applied the general rule that a court should prefer to decide a case on nonconstitutional grounds whenever possible. N.C. Opp. at 6-7, 9-10. However, the respondents overlook a crucial detail: the court of appeals ruled in favor of petitioners on the nonconstitutional ground, yet entered judgment in favor of respondents.

Certainly the court below could have affirmed the judgment for petitioners on nonconstitutional grounds. Or, the court below could have rejected the alternative nonconstitutional basis for the judgment and proceeded to decide the constitutional question. But to accept an alternative basis for challenging the threatened unconstitutional enforcement while rejecting petitioners' as applied challenge is simply bizarre. This is equivalent to saying, "Petitioners win. Let judgment be entered for respondents." Respondents, of course, make no attempt to explain or defend this perverse holding.

In effect, the court of appeals held that because the challenged state statute was constitutional on its face, the unconstitutional application of that statute was ipso facto unauthorized. Pet. App. 12a-14a; N.C. Opp. at 9-10. This holding would be bad enough, as it collapses the distinction between facial and as applied challenges and essentially abolishes the latter. Pet. at 12-14. But it is absurd beyond description to rule that, because the threatened enforcement was "improper and unsustainable," N.C. Opp. at 11, i.e., illegal, the petitioners' "as applied" challenge to the statute must fail.

This Court should grant review and summarily reverse the court of appeals as to petitioners' as applied challenge to N.C.G.S. § 14-277.4. In the alternative, this Court should grant plenary review.

II. THIS COURT SHOULD GRANT REVIEW OF PETITIONERS' FACIAL CHALLENGE TO FACE, 18 U.S.C. § 248.

Petitioners have demonstrated already that the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, is unconstitutional because it both exceeds Congressional power under the Commerce Clause and violates the First and Fifth Amendments. Pet. at 14-30. Those arguments need not be repeated, as the federal respondents have failed to supply persuasive counterarguments. See Brief for United States in Opposition (hereafter, "U.S. Opp."). Several points regarding the position of the United States deserve special mention, however.

A. FACE Exceeds Federal Commerce Clause Power.

In United States v. Lopez, 514 U.S. 549 (1995), this Court reaffirmed that there is no plenary federal police power. Id. at 566. Congress does have power, under the Commerce Clause, to regulate "those activities that substantially affect

interstate commerce." Id. at 559 (emphasis added). To establish this "substantial relation to interstate commerce," id., the federal statute must either: contain an explicit jurisdictional element connecting the regulated activity to interstate commerce on a case-by-case basis, id. at 561; or, regulate intrastate economic activity (e.g., growing wheat, engaging in loan-sharking, pricing milk products) which, in the aggregate, substantially affects interstate commerce, id. at 559-61, 567.

FACE has no jurisdictional element. And as the Fourth Circuit admitted, "the activity regulated by FACE" -- obstructive protest activity -- is "not itself economic or commercial." Pet. App. 23a. Accordingly, FACE cannot be upheld without discarding the limits so recently articulated in Lopez. Pet. § II(B)(1).

The brief of the federal respondents illustrates precisely this constitutional flaw.

The United States offers no argument in defense of FACE that would not also "justify," under the Commerce Clause, any federal legislation designed to protect any business. See U.S. Opp. at 11 (regulated activities have "adverse impact" on business); id. at 12 (some patients and staff cross state lines to get to the business); id. at 13-14 (effect of regulated activities on business is "direct").

Moreover, there is no credible argument that FACE somehow addresses a unique problem for the world of commerce. If an alleged "1000 acts of violence"[1] throughout

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[1]Petitioners do not concede that this figure is in any way accurate. This grossly inflated figure simply reflects self-serving propaganda from proponents of the abortion industry. As this Court is surely aware, any true act of significant personal violence against an abortionist or abortion employee becomes instant, national news. There have not been anywhere near a dozen such

the entire nation over a period of more than 15 years suffices to justify special federal protection of the abortion industry, U.S. Opp. at 2, 12, without even the need for a statutory jurisdictional element, then it is a very simple matter to justify a federal shoplifting,[2] commercial burglary,[3] or vandalism statute, likewise without even any jurisdictional requirement. If that is so, then, contrary to this Court's repeated admonition, Congress does indeed have plenary police power, at least over all matters affecting businesses.[4] (A fortiori, Congress may likewise directly regulate business as well, whether the business be abortion, tobacco farming, bowling, or any other enterprise that in the aggregate has a substantial effect on commerce.)

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incidents, much less a thousand.

[2]In 1994 alone, there were over a million crimes of shoplifting in the United States, with an average value for stolen property of $133. Crime in the United States 1994 (FBI Uniform Crime Reports, Department of Justice, Nov. 19, 1995), p. 205, Table 23 (Offense Analysis, 1994, and Percent Change from 1993).

[3]In 1994 alone, there were over 750,000 burglaries of nonresidences (i.e., stores, offices, etc.), at an average valued loss of $1,341 per burglary. Crime in the United States 1994, supra note 2, p. 205, Table 23.

[4]"Prostitution and commercialized vice" -- an industry with an interstate commerce connection at least as strong as that of abortion -- was associated with 111 murders from 1990 through 1994 (compared to one murder of an abortionist from 1977 through April 1993, U.S. Opp. at 2). Crime in the United States 1994, supra note 2, p. 21, Table 2.14 (Murder Circumstances, 1990-1994). Under the theory proffered by the United States, a federal homicide-in-connection-with-prostitution statute would come within the Commerce power of Congress without any need to prove a jurisdictional element. Moreover, arguments over money or property spawned 2,349 murders from 1990 through 1994, id., presumably making such matters a fit matter for federal criminal legislation under the Commerce Clause as well.

The federal respondents apparently consider this Court's Lopez decision to be an aberration strictly limited to its facts. Were an amended Gun Free School Zones Act to proscribe possession of guns near businesses, instead of schools, or to proscribe use instead of mere possession of guns near schools, the United States contends, Lopez would not apply. U.S. Opp. at 13-14.

Petitioners reject this pinched view of Lopez. The Lopez decision is just one of many cases illustrating that this Court takes seriously the bedrock constitutional concepts of federalism and limited national government. E.g., Printz v. United States, 117 S. Ct. 2365 (1997); City of Boerne v. Flores, 117 S. Ct. 2157 (1997); Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

FACE represents an act of federal overreaching in violation of important constitutional limits on the power of Congress. The Commerce Clause simply does not enable Congress to pass a federal disorderly-conduct-and-obstruction statute.

B. FACE Violates the First and Fifth Amendments.

FACE treats identical conduct as prohibited or permitted, depending upon whether the actor is protesting abortion (prohibited) or not (permitted). Pet. at 24-27. It is therefore flagrantly viewpoint-based and unconstitutional. Id.

The United States seeks shelter for FACE in the draftcard-burning case, United States v. O'Brien, 391 U.S. 367 (1968). See U.S. Opp. at 17. But the statute at issue in O'Brien outlawed the destruction of draft cards, regardless of the actor's motive for the destruction. 391 U.S. at 370. Had that statute forbidden the burning of draft cards only when the actor destroyed the card "because such card furthers

military readiness or operations," for example, the analogy to FACE would be more apt and, like FACE, the statute would unconstitutionally penalize a disfavored viewpoint.

The United States is correct that certain motives may be made an element of an offense. U.S. Opp. at 16. But just because illegitimate motives (e.g., the race of the victim) may be targeted, it does not follow that a statutory violation could hinge upon -- and thus penalize -- a wholly proper motivation, such as one's own religious beliefs, political sympathies, opposition to war or abortion, etc. On the contrary, the latter sort of regulation would unconstitutionally burden the one constitutional absolute -- freedom of belief. Employment Division v. Smith, 494 U.S. 872, 877 (1990).

The United States claims that FACE is viewpoint neutral because it "is justified by the need to protect interstate commercial transactions, to protect women who seek to [abort], and to maintain public safety and order." U.S. Opp. at 15. This argument is specious. An environmental group's blockade of an abortion business would impinge these very same purported justifications, yet would not violate FACE. Pet. at 24-25 (quoting S. Rep. No. 117, 103rd Cong., 1st Sess. 24 (1993)). The only reason to allow a pro-environment blockade while prohibiting a pro-life blockade at the very same site is to penalize the pro-life viewpoint that motivates the latter conduct.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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